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UNITED STATES
COURT OF APPEALS

FIFTH CIRCUIT.

No. 16,140

GEORGE T. NISHIDA and JAMES E. NISHIDA d/b/a HILO DAIRY COMPANY OF KAUAI; RYOJU SOKEI, d/b/a SOKEI DAIRY, and FRED L. WALDRON, LIMITED,

Appellants,

versus

E. I. DuPONT de NEMOURS & COMPANY,

Appellee.

Appeals from the United States District Court for the Northern District of Mississippi.

(ORIGINAL RECORD RECEIVED JUN. 4/56.)

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APPELLEE'S DESIGNATION AS TO PRINTING RECORD.

Filed June 5, 1956.

No. 16,140.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

GEORGE T. NISHIDA and JAMES E. NISHIDA, doing business as Hilo Dairy Company of Kauai, a Co-Partnership,

RYOJU SOKEI, doing business as Sokei Dairy, FRED L. WALDRON, LIMITED,

Appellants,

versus

E. I. DU PONT DE NEMOURS & COMPANY, a Corporation,

Appellee.

Pursuant to Rule 23(1), Rules of the United States Court of Appeals for the Fifth Circuit, E. I du Pont de Nemours & Company, a corporation, Defendant in each of the three cases heretofore pending in the United States District Court for the Northern District of Mississippi, Greenville Division, and as Appellee in the case styled and numbered as aforesaid in the United States Court of Appeals for the Fifth Circuit, wherein said three District Court cases are now pending before this Honorable Court as one case, hereby requests and directs the Clerk of the United States Court of Appeals for the Fifth Circuit to print, except

as otherwise designated by Appellee as set forth below and on the following pages, and include in the printed Record on Appeal in the cause above styled and numbered (in addition to the portions of the record designated to be printed by Plaintiffs-Appellants in said cause, which Designation for Printing by Appellants is included in the original Appeal Record forwarded to this Court by the District Court), all of those portions of the Trial Court record which are described and set forth in the "Counter-Designation of Additional Portions of Record on Appeal" which was filed by said Defendant-Appellee in the United States District Court for the Northern District of Mississippi, Greenville Division, on May 29, 1956, in each of said three cases, all of which are now brought to this Court as one case on appeal.

For the convenience of the Clerk of this Court, a copy of said "Counter-Designation of Additional Portions of Record on Appeal", as filed in the Trial Court in one of said cases, to-wit, Civil Action No 145, styled "Ryoju Sokei, doing business as Sokei Dairy, Plaintiff, v. E. I. du Pont de Nemours & Company, a Corporation, Defendant", is attached hereto, marked Exhibit "A", and made a part hereof. Said copy, thus marked and made Exhibit "A", save and except the caption of the particular cause, is identical with the like designated instrument filed in each of the two other causes in the Trial Court, to-wit, in Civil Actions Nos. 142 and 143, with the further exception that in Civil Action No. 142, because of the presence of two Plaintiffs therein, wheresoever the word "Plaintiff's " appears in Exhibit "A" attached hereto, the word "Plaintiffs' " appears in said Civil Action No. 142.

In the printing of the additional portions set forth in said "Counter-Designation of Additional Portions of Record on Appeal", copy of which is made Exhibit "A" hereto, in order to save unnecessary expense and to avoid duplication, Appellee now requests and directs the Clerk of this Court, and the printer for him, to deal with certain items set forth in said "Counter-Designation of Additional Portions of Record on Appeal" in the manner following:

A.

As to te Motions set forth in Items 1, 3, 5, and 7 in said "Counter-Designation of Additional Portions of Record on Appeal", copy of which is made Exhibit "A" hereto, print only said Motions as they appear in the case styled and numbered "Ryoju Sokei, doing business as Sokei Dairy, Plaintiff, v. E. I. du pont de Nemours & Company, a Corporation, Defendant, Civil Action No. 145", (hereinafter referred to as the Sokei case), with the comments or notations made at the top of said printing made as now specifically described as to each of said items, the reason for this request and direction being that the applicable Motion in said Sokei case is identical with a like Motion made in the other two cases, to-wit, in Civil Actions Nos. 142 and 143, except as now otherwise noted. To be more specific on the score, Appellee now suggests the following notations to appear before each of the Motions to be printed from said Sokei case:

(a) As to Item 1, being the "Motion of Defendant for a Directed Verdict", as to the Complaint and any and all Counts thereof, made at the close of Plaintiff's case, insert the following notation preceding said Motion:

"(Caption omitted. Filed November 28, 1955. The following Motion was made in each of the three cases appealed from, in identical language, except when the word 'Plaintiff' hereinafter appears, the applicable word in the Nishida case is 'Plaintiffs'.)"

(b) As to Item 3, being the "Motion of Defendant for a Directed Verdict" on Counts One, Two and Three, known as the Contract Counts, made at the close of Plaintiff's case, insert the following notation preceding said Motion:

"(Caption omitted. Filed November 28, 1955. The following Motion was made in each of the three cases appealed from, in identical language, except when the word 'Plaintif' hereinafter appears, the applicable word in the Nishida case is 'Plaintiffs', and except in the Waldron case, Paragraph 7 is entirely omitted.)"

(c) As to Item 5, being the "Motion of Defendant for a Directed Verdict", as to the Complaint and any and all Counts thereof, made at the close of all the evidence in the case, insert the following notation preceding said Motion:

"(Caption omitted. Filed November 29, 1955 The following Motion was made in each of the three cases appealed from, in identical language, except when the word 'Plaintiff' hereinafter appears, the applicable word in the Nishida case is 'Plaintiffs'.)"

(d) As to Item 7, being the "Motion of Defendant for a Directed Verdict", on Counts One, Two and Three, known as the Contract Counts, made at the

close of all the evidence in the case, insert the following notation preceding said Motion:

"(Caption omitted. Filed November 29, 1955. The following Motion was made in each of the three cases appealed from, in identical language, except when the word 'Plaintiff' hereinafter appears, the applicable word in the Nishida case is 'Plaintiffs', and in the Waldron case, Paragraph 7 is entirely omitted.)"

B.

As to the "Order of the Court" referred to in Items 2, 4, 6 and 8 in said "Counter-Designation of Additional Portions of Record on Appeal", copy of which is made Exhibit "A" hereto, inasmuch as each of said orders overruled or denied, in the composite, the applicable Motion as made by Defendant in each of the three cases appealed from, each of said orders need be printed only one time, as to each of said Items 2, 4, 6 and 8.

C.

As to "all Exhibits" set forth in Item 9 in said "Counter-Designation of Additional Portions of Record on Appeal, copy of which is made Exhibit "A" hereto, inasmuch as the exhibits therein referred to, being Defendant's Exhibits D-1 through D-16, were introduced on the trial when all of the three cases appealed from were consolidated, and inasmuch as all of said exhibits are being forwarded to the Court of Appeals as originals and the Trial Court has ordered that none of them be duplicated, printed or reproduced, none of said exhibits shall be printed.

D.

As to "all colloquies between Counsel" set forth in Item 10 of the "Counter-Designation of Additional Portions of Record on Appeal", copy of which is made Exhibit "A" hereto, inasmuch as all three cases appealed from were consolidated for trial in the Trial Court, which colloquies appear from Page 439 to Page 463, both inclusive, of the Typewritten Transcript, said "colloquies between Counsel, and between Court and Counsel" need be printed only one time, that is, by one printing plate.

E.

As to "This Counter-Designation" set forth in Item 11 in said "Counter-Designation of Additional Portions of Record on Appeal," copy of which is made Exhibit "A" hereto, as made in each of the three cases, are identical with the exceptions below noted, print only the said instrument as appears in the Sokei case with the following notation to appear before the same:

"(Caption omitted. Filed May 29, 1956. The following instrument was filed in each of the three cases appealed from, in identical language, except when the word 'Plaintiff's' hereinafter appears, the applicable word in the Nishida case is 'Plaintiffs'.)"

Dated this the 5th day of June, 1956.

EARL T. THOMAS,
(Earl T. Thomas),

Office and post office address:
900 Lamar Life Building,
Jackson, Mississippi.

CARL E. GEUTHER,
Attorneys for E. I. duPont de Nemours & Company, Appellee herein.

Office and post office address:
7098 Du Pont Building,
Wilmington, Delaware.
WELLS, THOMAS & WELLS,
900 Lamar Life Building,
Jackson, Mississippi,
Of Counsel.

Affidavit of Service.

State of Mississippi,
County of Hinds.

Earl T. Thomas, being by me first duly sworn, makes oath that he has served the above and foregoing "Appellee's Designation of Portions of the Record to be Printed", on Counsel for Plaintiffs-Appellants by mailing this date, first class air mail, postage prepaid, true copies thereof, respectively, to the following Attorneys of Record for said Plaintiffs-Appellants, at the following respective addresses thereof:

William G. Burgin, Jr., Esq.,
516 North Second Avenue,
Columbus, Mississippi.

Roger E. Brooks, Esq.,
923—20th Street, N. W.,
Washington 6, D. C.

Nils Tavares, Esq.,
Messrs. Pratt, Tavares & Cassidy,
Alexander & Baldwin Building,
Honolulu, Hawaii.

Shiro Kashiwa, Esq.,
Messrs. Kashiwa & Kashiwa,
Hawaiian Trust Building,
Honolulu, Hawaii.

David Ingman, Esq.,
Alexander Young Building,
Honolulu, Hawaii.

EXHIBIT "A"

Counter-Designation of Additional Portions of Record on Appeal

United States District Court for the Northern District of Mississippi, Greenville Division

Ryan Sokes, doing business as Ryan Sales Manual

v. Civil Action No. 68

E. I. Du Pont de Nemours & Company, a Corporation, Defendant

Please take notice that E. I. Du Pont de Nemours & Company, a corporation, Defendant-Appellee, hereby designates the following portions of the record and proceedings, in addition to those designated by Appellant, to be certified by the Clerk of the United States District Court aforesaid and to be filed with the Clerk of the United States Court of Appeals for the Fifth Circuit in the record on appeal in this action:

1. Motion to Determine Jurisdictional Amount and to Dismiss Action, filed in the above entitled cause on the 21st day of March, 1968.

2. Order of the Court dated March 21, 1968, overruling Motion to Determine Jurisdictional Amount and to Dismiss Action, filed in the above entitled cause on the 21st day of March, 1968.

3. Motion of Defendant for a Directed Verdict on Counts One, Two and Three, known as the Contract Counts, made at the close of Plaintiff's case, which written Motion was filed and made a part of the record in this cause on November 28, 1955, the motion to file said written Motion having been made and permission so thus to file granted by the Court as appears from Page 269 of the Typewritten Transcript herein;

4. Order of the Court overruling the last above-mentioned Motion for Directed Verdict, which Order appears on Page 271 of the Typewritten Transcript herein;

5. Motion of Defendant for a Directed Verdict, as to the Complaint herein and any and all Counts thereof, made at the close of all the evidence in this case, which written Motion was filed and made a part of the record in this cause on November 29, 1955, the motion to file said written Motion having been made and permission so thus to file granted by the Court as appears from Page 438 of the Typewritten Transcript herein;

6. Order of the Court overruling the last above-mentioned Motion for Directed Verdict, which Order appears on Page 438 of the Typewritten Transcript herein;

7. Motion of the Defendant for a Directed Verdict as to Counts One, Two and Three, known as the Contract Counts, made at the close of all the evidence in this case, which written Motion was filed and made a part of the record in this cause on November 29,

1955, the motion to file said written Motion having been made and permission so thus to file granted by the Court as appears from Page 438 of the Typewritten Transcript herein;

8. Order of the Court overruling the last above-mentioned Motion for Directed Verdict, which Order appears on Page 439 of the Typewritten Transcript herein;

9. All Exhibits admitted in evidence in this cause on behalf of Defendant, these Exhibits being received in evidence and marked with the following Exhibit numbers, and a summary description of each exhibit being set forth as follows:

Exhibit Number	Summary Description
D-1	List of cattle at Hilo Dairy.
D-2	Ledger account for cattle for Hilo Dairy.
D-3	Summary of cows purchased since July 1, 1946.
D-4	Letter of October 11, 1949, from Lyman Reed to F. G. Low of du Pont.
D-5	Photostatic copies of chemical safety data sheets and other printed matter.
D-6	Photostatic copy of underwriters laboratories card on cleaning liquid.
D-7	Photostatic copy of printed material on du Pont chlorinated hydrocarbons.
D-8	Letter from Magnolia Soy Products Company, by L. L. Ford, dated February 14, 1952, to Mr. C. B. Shepherd, du Pont.
D-9	Photostatic copy of an excerpt from "Feedstuffs", a weekly newspaper dated October 6, 1951.
D-10	Letter from C. B. Shepherd to Lyman Reed dated July 31, 1951.

Exhibit Number	Summary Description
D-11	Copy of original Order from Magnolia Soy Products Company to E. I. du Pont, the Order having been entered on October 2, 1951, and the invoice being dated November 21, 1951.
D-12	Factory shipping advice from du Pont to Magnolia Soy Products Company, shipping date shown as November 19, 1951.
D-13	An Acknowledgment of Order from du Pont to Magnolia Soy Products Company showing the Order entered October 2, 1951, front and reverse.
D-14 a	Copy of Uniform Straight Bill of Lading issued by Illinois Central Railroad Company showing car number IC-27893 was received for shipment in Greenville, Mississippi, on November 26, 1951.
D-14 b	Copy of Memorandum of Bill of Lading issued by Illinois Central Railroad Company showing that car number IC-27831 was received for shipment in Greenville, Mississippi, on November 26, 1951.
D-14 c	Copy of Uniform Straight Bill of Lading issued by Illinois Central Railroad Company showing car number IC-32008 was received for shipment in Greenville, Mississippi, on the 23rd day of November, 1951.
D-15 a	Copy of Memorandum of Bill of Lading issued by Illinois Central Railroad Company showing that car number NYC-178296 was received for shipment on the 26th day of November, 1951.
D-15 b	Copy of Memorandum of Bill of Lading issued by Illinois Central Railroad Company showing that car number SOU-22061 was received for shipment from Greenville, Mississippi, on December 8, 1951.

Exhibit Number	Summary Description
D-15 c	Shipping Order of Illinois Central Railroad Company showing that car number NH-33672 was received for shipment from Greenville, Mississippi, on December 10, 1951.
D-16	Request of the Court to take judicial notice of the law of the State of New York;

10. All colloquies between Counsel and between Court and Counsel, as appear from Page 439 to Page 463, both inclusive, of the Typewritten Transcript; and

11. This Counter-Designation.

(S.) EARL T. THOMAS,
(Earl T. Thomas),

Office and Post Office Address:
900 Lamar Life Building,
Jackson, Mississippi.

CARL E. GEUTHER,
Attorneys for Appellee-Defendant.

Office and Post Office Address:
7098 Du Pont Building,
Wilmington, Delaware.

WELLS, THOMAS & WELLS,
900 Lamar Life Building,
Jackson, Mississippi,
Of Counsel.

Affidavit of Service.

State of Mississippi,
County of Hinds.

Earl T. Thomas, being by me first duly sworn, makes oath that he has served the above and foregoing Counter-Designation of Additional Portions of Record on Appeal on Counsel for the Plaintiffs by mailing this date, first class air mail, postage prepaid, true copies thereof, respectively, to the following Attorneys of Record for the Plaintiffs, at the following respective addresses thereof:

William G. Burgin, Jr., Esq.
516 North Second Avenue
Columbus, Mississippi
Roger E. Brooks, Esq.
923—20th Street, N. W.
Washington 6, D. C.
Nils Tavares, Esq.
Messrs. Pratt, Tavares & Cassidy
Alexander & Baldwin Building
Honolulu, Hawaii
Shiro Kashiwa, Esq.
Messrs. Kashiwa & Kashiwa
Hawaiian Trust Building
Honolulu, Hawaii
David Ingman, Esq.,
Alexander Young Building
Honolulu, Hawaii;

their usual and respective post office addresses.

(S.) EARL T. THOMAS,
(Earl T. Thomas).

Sworn to and subscribed before me, this the 28th day of May, 1956.

(S.) MILDRED LUSK,
(Seal) Notary Public.

My Commission Expires Jan. 31, 1960.

APPELLANTS' DESIGNATION AS TO PRINTING RECORD.

Filed June 6, 1956.

United States Court of Appeals for the Fifth Circuit.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership,

Ryoju Sokei, doing business as Sokei Dairy, Fred L. Waldron, Limited, Appellants,

vs. No. 16140.

E. I. Du Pont de Nemours & Company, a Corporation, Appellees.

The plaintiffs-appellants in the above-captioned causes hereby direct the Clerk of the United States Court of Appeals for the Fifth Circuit to print and include in the printed record on appeal in these causes all of those portions of the Trial Court record which are enumerated in and described below, to-wit:

1. Complaints filed December 9, 1953 in each of the above-captioned causes.

2. Answers to complaints filed January 14, 1954 in each of the above-captioned causes.

3. Motion of defendants for summary judgment.

4. Order denying motion for summary judgment.

5. Motion to consolidate the three actions.

6. Order granting motion to consolidate.

7. Stipulations entered of record.

8. Written instructions filed by plaintiffs.

9. Ruling of the Court denying request for allowance of plaintiffs' written instructions.

10. Exception to ruling of the Court denying plaintiffs' request for allowance of written instructions.

11. Verdict, together with the direction for the entry of judgment thereon.

12. Opinion.

13. Plaintiffs' motion for new trial.

14. Order entered February 2, 1956, denying plaintiffs' motion for new trial.

15. Judgment.

16. Notices of appeal filed.

17. Typewritten transcript of the opening statement of the Court to the jury and charge of the Court to the jury and of the testimony taken at the trial of these causes of the following-named witnesses:

For the plaintiffs—L. L. Ford and Dr. Raymond T. Vaughn;

For the defendant— R. Stuart Armstrong, C. B. Shepherd, and Frank McDonald.

18. Copy of designation of record on appeal on behalf of plaintiffs-appellants, dated May 21, 1956.

19. Statement of points on which appellants rely, filed May 21, 1956.

20. All exhibits offered in evidence by plaintiffs, the admission of which was refused.

Dated this 6th day of June, 1956.

PRATT, TAVARES & CASSIDY,
SHIRO KASHIWA,
INGMAN & INGMAN,
ROGER E. BROOKS,
WILLIAM G. BURGIN, JR.,
Attorneys for Plaintiffs-Appellants,
By WM. G. BURGIN, JR.,
(Wm. G. Burgin, Jr.).

516 Second Avenue North,
Columbus, Mississippi.

Certificate.

I, Wm. G. Burgin, Jr., of counsel for Plaintiffs, hereby certify that I have this day mailed a true copy of the foregoing Designation, postage prepaid, to Honorable Earl T. Thomas, Attorney, Lamar Life Building, Jackson, Mississippi and to Honorable Carl E. Guether Attorney, DuPont Building, Wilmington, Del., counsel for Defendant.

This the 6th day of June, 1956.

WM. G. BURGIN, JR.,
(Wm. G. Burgin, Jr).

JOINT STIPULATION AS TO PRINTING CERTAIN PORTIONS OF THE RECORD AS DESIGNATED BY APPELLEE.

Filed June 13, 1956

United States Court of Appeals for the Fifth Circuit.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a Co-Partnership; Ryoju Sokei, doing business as Sokei Dairy; and Fred L. Waldron, Limited, Appellants,

v. No. 16,140.

E. I. DuPont de Nemours & Company, a Corporation, Appellee.

To: Honorable John A Feehan, Jr., Clerk of the United States Court of Appeals for the Fifth Cir-

cuit, and to the Printer Designated by him for the Purpose of Printing the Record:

It Is Hereby Stipulated by and between Wm. G. Burgin, Jr., Esq., of Counsel for the Appellants, and Earl T. Thomas, Esq., of Counsel for the Appellees, in the above and foregoing cause, that in order to save expense and duplication in printing, that as to the various Motions for a Directed Verdict made by Appellee, Defendant in the District Court, which Motions are referred to and set out in "Appellee's Designation of Portions of the Record to be Printed" filed in this Court on June 5, 1956, that the Clerk aforesaid may make the following notations on the various Motions referred to in said Designation, by pasting or otherwise of said notations on the respective Motions, said notations being for the direction and benefit of the printer in printing the record:

1.

As to the "Motion of Defendant for a Directed Verdict" as to the Complaint, and any and all counts thereof, made at the close of Plaintiff's case, paste or insert the following notation as to each of the three cases styled and numbered in the District Court in the manner below:

As to the Nishida Case.

(Civil Action No. 142, District Court).

Do Not Print.

(as Counsel for the parties dispense with the same by Stipulation.)

JOHN A. FEEHAN, JR.,
Clerk.

As to the Fred L. Waldron, Ltd. Case.

(Civil Action No. 143, District Court).

Do Not Print.

(as Counsel for the parties dispense with the same by Stipulation.

JOHN A. FEEHAN, JR.,
Clerk.

As to the Sokei Case.

(Civil Action No. 145, District Court).

("Caption omitted. Filed November 28, 1955. The following Motion was made in each of the three cases appealed from in identical language, except when the word 'Plaintiff' hereinafter appears, the applicable word in the Nishida case is 'Plaintiffs.')"

JOHN A. FEEHAN, JR.,
Clerk.

2.

As to the "Motion of Defendant for a Directed Verdict" on Counts One, Two and Three, known as the Contract Counts, made at the close of Plaintiff's case, paste or insert the following notation as to each of the three cases styled and numbered in the District Court in the manner below:

As to the Nishida Case.

(Civil Action No. 142, District Court).

Do Not Print.

(As Counsel for the parties dispense with the same by Stipulation.)

JOHN A. FEEHAN, JR.,
Clerk.

As to the Fred L. Waldron, Ltd. Case.

(Civil Action No. 143, District Court).

Do Not Print.

(as Counsel for the parties dispense with the same by Stipulation.)

JOHN A. FEEHAN, JR.,
Clerk.

As to the Sokei Case.

(Civil Action No. 145, District Court).

"(Caption omitted. Filed November 28, 1955. The following Motion was made in each of the three cases appealed from, in identical language, except when the word 'Plaintiff' hereinafter appears, the applicable word in the Nishida case is 'Plaintiffs', and except in the Waldron case, Paragraph 7 is entirely omitted.)"

JOHN A. FEEHAN, JR.,
Clerk.

3.

As to the "Motion of Defendant for a Directed Verdict", as to the Complaint and any and all Counts thereof, made at the close of all the evidence in the case, paste or insert the following notation as to each of the three cases styled and numbered in the District Court in the manner below:

As to the Nishida Case.

(Civil Action No. 142, District Court).

Do Not Print.

(as Counsel for the parties dispense with the same by Stipulation.)

JOHN A. FEEHAN, JR.,
Clerk.

As to the Fred L. Waldron, Ltd. Case.

(Civil Action No. 143, District Court).

Do Not Print.

(as Counsel for the parties dispense with the same by Stipulation.)

JOHN A. FEEHAN, JR.,
Clerk.

As to the Sokei Case.

(Civil Action No. 145, District Court).

"(Caption omitted. Filed November 29, 1955. The following Motion was made in each of the three cases appealed from, in identical language, except when the word 'Plaintiff' hereinafter appears, the applicable word in the Nishida case is 'Plaintiffs'.)"

JOHN A. FEEHAN, JR.,
Clerk.

4.

As to the "Motion of Defendant for a Directed Verdict", on Counts One, Two and Three, known as the Contract Counts, made at the close of all the evidence in the case, paste or insert the following notation as to each of the three cases styled and numbered in the District Court in the manner below:

As to the Nishida Case.

(Civil Action No. 142, District Court).

Do Not Print.

(as Counsel for the parties dispense with the same by Stipulation.)

JOHN A. FEEHAN, JR.,
Clerk.

As to the Fred L. Waldron, Ltd. Case

(Civil Action No. 143, District Court).

Do Not Print

(as Counsel for the parties dispense with the same by Stipulation.)

JOHN A. FEEHAN, JR.,
Clerk.

As to the Sokei Case

(Civil Action No. 145, District Court.)

"(Caption omitted. Filed November 29, 1955. The following Motion was made in each of the three cases appealed from, in identical language, except when the word 'Plaintiff' hereinafter appears, the applicable word in the Nishida case is 'Plaintiffs', and in the Waldron case, Paragraph 7 is entirely omitted."

JOHN A. FEEHAN, JR.,
Clerk.

Witness our signatures, this June 9, 1956.

(Signed) WM. G. BURGIN,
(Wm. G. Burgin),
Of Counsel for Appellants

Columbus, Mississippi.

EARL T. THOMAS,
(Earl T. Thomas),
Of Counsel for Appellee

Jackson, Mississippi.

Validated, Authorized and Approved.

ROGER E. BROOKS,
(Roger E. Brooks),
Chief Counsel for Appellants.

COMPLAINT

Filed this 9 day of Dec. 1953.

In the United States District Court for the Northern District of Mississippi.

George T. Nishida and James E. Nishida, doing business as the Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

vs Civil Action No. 142

E. I. Du Pont de Nemours & Company, a corporation, Defendant.

Count One.

1. The plaintiffs are and at all times mentioned in this complaint were residents of Kappa District of

the County of Kauai, Island of Kauai, Territory of Hawaii, and for many years prior to the date hereof, the plaintiffs were and are now engaged in the dairy business within the Territory of Hawaii, under the name and style of "Hilo Dairy Company" and are copartners duly registered pursuant to the laws of the said Territory; the copartnership was created in the year 1947 and ever since the two plaintiffs have been the sole and only partners.

2. The defendant is a corporation organized and existing under the laws of the State of Delaware, with its domicile and principal office in Wilmington, Delaware, and having qualified to do business and doing business in the State of Mississippi, and having appointed an agent for the service of process for suits in said state, to wit: R. H. Thompson, in Jackson, Hinds County, Mississippi, upon whom service of process may be had.

3. The matter in controversy exceeds the sum or value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

4. The jurisdiction of the Court is invoked under Section 1332, Title 28, U. S. Code, June 25, 1948, c. 646, 62 Stat. 930; and under the Federal Food, Drug and Cosmetic Act, Chapter 9, Title 21, U. S. Code, June 25, 1938, c. 675, 52 Stat. 1040.

5. During the year 1947 and continuously since that date the plaintiffs have been and are now engaged in the aforesaid dairy business in the County of Kauai, Territory of Hawaii, the said business consisting of raising, feeding and maintaining cows for the

purpose of milking said cows and selling the milk obtained throughout the County of Kauai.

6. On or about the end of 1951 and up to the time of the occurrence of the incidents hereinafter more particularly described, the plaintiffs owned and were using in their said business, about one hundred and one head of good dairy cows and the said business was a prosperous and profitable one with excellent good will and a large number of customers within the said County of Kauai.

7. During the latter part of the year 1951, the plaintiffs for a fixed consideration ordered for purchase from Fred L. Waldron, Limited, a corporation, incorporated under the laws of the Territory of Hawaii, with its principal office, at all times herein mentioned at 808 Fort Street, Honolulu, City and County of Honolulu, Territory of Hawaii, 300 sacks of soybean meal weighing 100 pounds each and the said Waldron, Limited, on receipt of said order of purchase agreed to accept it and in accordance with the agreement did sell and deliver to the plaintiffs the 200 sacks of soybean meal and the said meal was accepted by plaintiffs.

8. For many years prior and to the date of this complaint, the said Waldron, Limited, was extensively engaged in the business of buying and selling feeds of all kinds for cattle and during the said period in the course of its business sold a considerable amount of various cattle feed in the County of Kauai.

9. The plaintiffs for years prior and continuously during the year 1951 and including the time of the

occurrence of the transactions herein alleged, purchased from the said Waldron, Limited, cattle feed including soybean meal and in all of said purchases the plaintiffs relied exclusively on the skill and judgment of the said seller in selecting cattle feed, including soybean meal of good quality and fit for consumption by plaintiffs' cattle and the said Waldron, Limited, in all of the purchases aforementioned and during the stated period of time well knew all the facts alleged in paragraph 5 hereof and that any soybean meal purchased by plaintiffs was for the purpose of feeding it to plaintiffs' aforesaid dairy herd.

10. Upon delivery of the 300 sacks of soybean meal, as aforesaid, plaintiffs fed the said soybean meal to their aforesaid dairy herd and as a result of the consumption of the said meal 51 of plaintiffs' dairy cows died and the remainder of the herd became violently ill, the meal in said sacks contained poisonous and toxic matter which directly and proximately caused the deaths and violent illnesses aforesaid and required plaintiffs to employ veterinarians and additional labor to care for the said herd, and as a direct result of the deaths of the dairy cows and the violent illness of the remainder of plaintiffs' herd of cattle, plaintiffs have not been and will not be able to supply milk to many of their customers, have lost a large number of customers and the good will of their business with the consequent great loss of profits and they will continue to suffer great loss of profits.

11. The said Waldron, Limited, for a fixed consideration placed an order to purchase two hundred (200) tons of solvent soybean meal sacked in burlap bags with the Brode Corporation of Memphis, Ten-

nessee, and the purchase order was accepted by confirmation of sale of the said corporation dated October 30, 1951.

12. The said Brode Corporation for a fixed consideration placed an order of purchase for the meal described in paragraph numbered 11 hereof with the Magnolia Soy Products Company of Greenville, Mississippi, and the said Company accepted the order and as part thereof, did ship through interstate commerce to the said Waldron, at Port Allen, Hawaii, the said 300 sacks of soybean meal, extracted with trichloroethylene, sold and delivered by Waldron, Limited, as herein alleged to the plaintiffs with the resulting loss to the dairy herd of the plaintiffs aforementioned.

13. The said soybean meal, extracted with trichloroethylene, as manufactured by the said Magnolia Soy Products Company, was placed in the aforesaid 300 sacks by the said Company at its plant in Mississippi and it was received by the said Waldron at Port Allen, Hawaii, in the original sacks of the aforesaid, each sack having attached when received, the said Company's identification tag, and the said 300 sacks of meal, each with said Company's identification tag attached, were delivered as aforesaid by Waldron to the plaintiffs, each sack having been unopened from the time it was placed in shipment by the said Company until received by the plaintiffs and by them opened for the feeding of the contents to the aforesaid dairy herd by them owned.

14. The defendant was engaged, among other activities, in the manufacture, for sale and distribution

through interstate commerce, of certain chemical compounds and sold and shipped through interstate commerce to Magnolia Soy Products Company a chemical solvent, to wit, trichloroethylene, for use in extracting soybean oil from soybeans, then and there well knowing that the soybean meal from which the soybean oil was to be extracted by use of its product trichloroethylene was to be sold for cattle feed; the defendant at the time of making the sale of the aforesaid chemical solvent to Magnolia Soy Products Company then and there knew, or by the exercise of ordinary care could have known, that soybean meal which had the soybean oil extracted therefrom by the use of the said chemical solvent became unfit for and dangerous as food for cattle, and knew or by the exercise of ordinary care could have known that said solvent, if used for the purpose for which the defendant recommended, sold and delivered it to the Magnolia Soy Products Company for use by the Company in the manner which defendant knew it would be used, would cause the soybean meal to become poisonous to and unfit as food for cattle.

15. The defendant well knew, or should have known, that soybean meal when processed with its manufactured product trichloroethylene, for sale and delivery through interstate commerce for feed for cattle was toxic and poisonous and would when fed to cattle, including the cattle of the plaintiffs, result in great and serious damage and the defendant through the sale and delivery of the said solvent for the aforesaid purpose then and there breached its implied warranty that soybean meal so manufactured would be fit and wholesome food for consumption by plaintiffs' said dairy herd; the implied warranty was

a material part and condition of the sale transaction and plaintiffs relied on said warranty.

16. By reason of said breach of implied warranty, plaintiffs have suffered great damage; the damages hereinafter claimed and alleged are damages for losses directly and proximately and naturally resulting in the ordinary course of events from the breach of warranty aforealleged by the defendant; at the time of the sale and delivery aforealleged defendant well knew, or should have known, that all of the losses hereinafter set forth would directly and proximately result from the said sale and delivery of poisonous and toxic soybean meal; the poisonous and toxic condition of the said meal resulting directly from the use in its processing and manufacturing of trichloroethylene manufactured, sold and delivered by the defendant to the Magnolia Soy Products Company; all losses for which damages are hereinafter claimed were all reasonably foreseeable.

17. By reason of the aforesaid breach of implied warranty, plaintiffs suffered the following specific and special damages: From the death of 51 good high quality milking cows as aforesaid, $40,000.00; from the violent illness of the remainder of the dairy herd, i. e., 50 high quality milking cows as aforealleged, $20,000.00; from, as alleged herein, the inability of the plaintiffs to supply milk, because of the reduction in the dairy herd through the aforesaid deaths and violent illnesses, resulting in loss of a large number of customers and the good will of the business, $20,000.00; from the great loss of profits suffered and the loss of profits which will be suffered, $30,000.00; by reason of required services of veteri-

narians and of additional labor arising solely out of the aforesaid deaths and illnesses of the dairy cows, $4,990.00.

18. The plaintiffs further claim as general damages, $30,000.00. The total of plaintiffs' damages, special and general, is $147,790.00.

19. Prior to the filing of this complaint plaintiffs requested and demanded of defendant payment of damages as aforesaid but defendant has paid no part thereof and refuses to pay the damages or any part thereof and there is now due and owing to the plaintiffs from the defendant the total sum of $147,790.00 by reason of the breach of the aforesaid warranty.

Count Two.

1. Plaintiffs reiterate and reallege all of the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of Count One hereof.

2. The defendant at the time of the aforementioned sale of and delivery of its manufactured product, the solvent trichloroethylene, to Magnolia Soy Products Company, knowing that the said Company would use the said solvent in extracting oil from soybeans and that the residual meal, including the aforesaid 300 sacks of meal sold and shipped in interstate commerce to the said Waldron, Limited, at Port Allen, Hawaii, and by the said Waldron sold and delivered to the plaintiffs for feed for their cattle, impliedly warranted to all purchasers including the plaintiffs that the contents of the aforesaid 300 sacks of soy bean meal were of merchantable quality; the implied

warranty was a material part and condition of the sale transaction and plaintiffs relied on said warranty, and the defendant well knew, or should have known, that the soybean meal manufactured through the use of the solvent trichloroethylene, for sale and delivery through interstate commerce to the general public and to Fred L. Waldron, Limited, for sale by the latter, within the said Territory for feed for cattle, including the cattle of the plaintiffs, was toxic and poisonous and would when fed to cattle result in great and serious damage and the defendant at the time of the aforesaid sale and delivery to the said Waldron then and there breached its implied warranty of the merchantable quality of the said soybean meal to the great damage to the plaintiffs.

3. The damages set out and claimed in paragraphs 17 and 18 of Count One hereof are damages for losses directly and proximately and naturally resulting in the ordinary course of events from the breach by defendant of the aforesaid warranty of merchantable quality and were all reasonably foreseeable by the defendant.

4. Plaintiffs reiterate and reallege all of the allegations in paragraphs 17, 18 and 19 of Count One hereof, and demand payment of the damages set out in said paragraphs 17 and 18 by reason of the aforesaid breach of the defendant's implied warranty of merchantable quality.

Count Three.

1. Plaintiffs reiterate and reallege all of the allegations in paragraph 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of Count One hereof.

2. The defendant at the time of the aforementioned sale and at the time of the said soybean meal was placed in the said 300 sacks by Magnolia Soy Products Company at its plant at Greenville, Mississippi, for shipment in interstate commerce to Waldron at Port Allen, Hawaii, expressly warranted to all purchasers including the plaintiffs that the contents of the aforementioned 300 sacks of soybean meal were of merchantable quality and fit for consumption by cattle and the express warrant was a material part and condition of the sale transaction and plaintiffs relied on said warranty, and the defendant well knew, or should have known, that the soybean meal manufactured and processed through the use of its product the solvent, trichloroethylene, for sale and delivery through interstate commerce to Fred L. Waldron, Limited, for sale within the Territory of Hawaii, for feed for cattle, including the cattle of plaintiffs, was toxic and poisonous and would when fed to cattle result in great and serious damage and the defendant at the time of the aforesaid sale and delivery to the said Waldron then and there breached its express warranty of the merchantable quality and fitness for consumption by cattle of the said soybean meal to the great damage of the plaintiffs.

3. The damages set out and claimed in paragraphs 17 and 18 of Count One hereof are damages for losses directly and proximately and naturally resulting in the ordinary course of events from the breach by defendant of the aforesaid express warranty of merchantable quality and fitness for consumption by cattle and were all reasonably foreseeable by the defendant.

4. Plaintiffs reiterate and reallege all of the allegations in paragraphs 17, 18 and 19 of Count One hereof and demand payment of the damages set forth in said paragraphs 17 and 18 by reason of the aforesaid breach of the defendant's express warranty of merchantable quality and fitness for consumption.

Count Four.

1. Plaintiffs reiterate and reallege all of the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of Count One hereof.

2. That at all times mentioned herein the laws of the Territory of Hawaii, as material herein, provided as follows:

"Chapter 41. Food, Drugs and Cosmetics.
Sec. 2201. Definitions. For the purposes of this part:

(d) 'Food' means articles used for food or drink for man or animals. . . (3) articles used for components of any such article. . .

Sec. 2206. Prohibited acts. The following acts and the causing thereof within the Territory by any person are hereby prohibited: (a) The manufacture, sale, or delivery, holding or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded. . . (d) The receipt in commerce of any food, drug, device or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise. . ."

Sec. 2209. Foods deemed to be adulterated when. A food shall be deemed to be adulterated: (a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 2213; or (3) if it consists in whole or in part of a diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been produced, prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health; . . .

3. That at all times mentioned herein the laws of the United States, as material herein, provided as follows:

Federal Food, Drug and Cosmetic Act (Vol. 5, FCA, Title 21).

"Sec. 321. Definitions; generally

(f) the term 'food' means (1) articles used for food or drink for man or other animals. . . (3) articles used for components of any such article.

"Sec. 331. Prohibited acts.

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise. . . ."

That the definition of adulterated food is the same as that recited above with relation to the laws of the Territory of Hawaii.

4. On or about December 1, 1951, plaintiffs for a fixed consideration ordered for purchase from Fred L. Waldron, Limited, Honolulu, Hawaii, 300 sacks of soybean meal to be used for feed for their cattle in this complaint described, the said Waldron, Limited, ordered for a fixed consideration said meal from The Brode Corporation of Memphis, Tennessee, and The Brode Corporation for a fixed consideration ordered for purchase, as set forth and alleged in paragraphs 11 and 12 of Count One hereof, the said soybean meal from the Magnolia Soy Products Company, Greenville, Mississippi.

5. The said Magnolia Soy Products Company accepted the said order and manufactured, packed, sold, shipped in interstate commerce and delivered the said 300 sacks of meal of 100 pounds each, to the said Waldron, Limited, at Honolulu, Territory of Hawaii, for sale by the said Waldron to the plaintiffs for feed for their cattle.

6. The defendant was engaged, among other activities, in the manufacture, for sale and distribution through interstate commerce, of certain chemical compounds and sold and shipped through interstate commerce to Magnolia Soy Products Company a chemical solvent to wit: trichloroethylene, for use in extracting soybean oil from soybeans, then and there well knowing that the soybean meal, from which the soybean oil was to be extracted by use of its product trichloroethylene was to be sold for cattle feed; the defendant at the time of making the sale of the aforesaid chemical solvent to Magnolia Soy Products Company then and there knew, or by the exercise of ordinary care could have known, that soybean meal which had the soybean oil extracted therefrom by the use of the said chemical solvent became unfit for and dangerous as food for cattle, and knew, or by the exercise of ordinary care could have known, that said solvent, if used for the purpose for which the defendant recommended, sold and delivered it to the Magnolia Soy Products Company for use by the Company in the manner which defendant knew it would be used, would cause the soybean meal to become poisonous to and unfit as food for cattle; the defendant knew that the chemical solvent, trichloroethylene, had caused death and injury to cattle when used for the aforesaid purpose at numerous previous times and would in this instance.

7. The defendant, at the time of the sale of the chemical solvent and the delivery through interstate commerce to Magnolia Soy Products Company or at any time thereafter, failed and neglected to inform the said Company, the plaintiffs or the general public that the aforesaid chemical solvent when used to ex-

tract soybean oil made the residual soybean meal poisonous and injurious to and unfit and unsound as food for cattle, the defendant owed a duty to do so and the failure to perform this duty constituted negligence.

8. The defendant recommended the use of and sold and distributed trichloroethylene through interstate commerce as a solvent to remove soybean oil from soybean meal, knowing that the residual meal was to be used as cattle food, knowing, or the defendant should have known, at the time of the sale and delivery of the trichloroethylene to Magnolia Soy Products Company that the Company would process, manufacture, market and distribute, through interstate commerce, to the general public the residual meal for use as cattle food and the said Company did manufacture, sell and distribute to the general public, including the plaintiffs, soybean meal so processed with the aforesaid solvent the defendant having knowledge or imputed knowledge of the dangerous qualities of the solvent trichloroethylene.

9. The defendant having knowledge or being chargeable with knowledge, of the use to be made by the Magnolia Soy Products Company of the defendant's product trichloroethylene, the sale and distribution through interstate commerce of the residual meal and the danger to cattle of the meal when so processed as food for cattle, a duty arose on the part of the defendant to perform and carry out such test as would make certain that the aforesaid soybean meal would not be unfit, unsound and injurious to cattle when fed to them. This duty the defendant failed to perform, thus the defendant is guilty of negligence.

10. The aforesaid negligence of the defendant up to the time of the injury to the plaintiffs directly and proximately caused the death and destruction of the plaintiffs' dairy cattle, and all of the other injuries to plaintiffs as herein specifically and generally set out.

11. The soybean meal, the contents of the said 300 sacks, was processed or manufactured through and by the use of the solvent trichloroethylene, a product or chemical manufactured by and sold and delivered through interstate commerce by the defendant to the said Magnolia Soy Products Company, the said soybean meal so manufactured was highly toxic and poisonous and when fed after delivery as aforesaid, to plaintiffs' herd of dairy cows caused 51 of them to die and the remainder, consisting of 50 cows, to become seriously ill.

12. The defendant, the manufacturer of the chemical, trichloroethylene, knew or should have known that the trichloroethylene would be used for the stated purpose by the said Magnolia Soy Products Company, knew or should have known that the soybean meal resulting from the use of the said chemical would be sold and delivered through interstate commerce for feed for cattle, and knew or should have known that the residual meal so processed was toxic and poisonous and would when fed to cattle cause serious illness and death to the cattle, notwithstanding such knowledge or imputed knowledge, the defendant carelessly and negligently manufactured and delivered as aforesaid the said chemical; thereby and by reason thereof the death and illness of the cattle and all and every injury of the plaintiffs as set out in this complaint were directly and proximately caused by the sale

and use of the said trichloroethylene in the processing of soybeans, resulting in the said poisonous and toxic meal.

13. There was a duty on the part of the defendant under the conditions and circumstances aforealleged to use reasonable care not to ship and deliver through interstate commerce the said trichloroethylene for use in the manufacture of soybean meal for feed for cattle, including the aforesaid cattle of the plaintiffs; the failure of the defendant to exercise due care constituted negligence.

14. Plaintiffs reiterate and reallege all of the allegations in paragraphs 17, 18 and 19 of Count One hereof.

15. By reason of said negligence the plaintiffs suffered great damage; the damages claimed are set out in paragraphs 17 and 18 of Count One hereof and are damages for losses directly and proximately and naturally resulting in the ordinary course of events from the negligence of the defendant as aforesaid, in that defendant well knew, or should have known, at the time of the said delivery of the aforesaid meal that it would be from the use of the defendant's manufactured chemical trichloroethylene poisonous and toxic; that all of the losses aforesaid would directly and proximately result, for all of the losses for which damages are claimed as aforealleged were reasonably foreseeable by the defendant.

16. The transaction upon which this cause of action is based is the same transaction alleged in Counts One, Two and Three of this complaint.

Wherefore, the plaintiffs demand judgment against the defendant in the sum of One Hundred Forty Seven Thousand Seven Hundred and Ninety Dollars ($147,-790.00).

SHIRO KASHIWA,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiffs.

923—20th Street, N. W.,
Washington, D. C.

DEMAND FOR JURY TRIAL.

The plaintiffs demand a trial by jury on all issues.

SHIRO KASHIWA,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiffs.

ANSWER OF E. I. DU PONT DE NEMOURS & COMPANY, DEFENDANT.

Filed this 14 day of Jan. 1954.

United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as the Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a corporation, Defendant.

Now comes E. I. Du Pont de Nemours & Company, (hereinafter, for the sake of brevity, sometimes referred to variously as "Defendant," "this Defendant" or "du Pont"), the Defendant in the above entitled and numbered action, and files this, its Answer to the Complaint herein.

Answer to Count One.

First Defense.

Count One of the Complaint fails to state a claim against this Defendant upon which relief can be granted.

Second Defense.

Now responding to, and following the same numbering of paragraphs of, Count One of the Complaint, Defendant answers and says:

1.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of Count One of the Complaint, and, therefore, the allegations of said paragraph of Count One are denied.

2 and 3.

Defendant admits the allegations contained in paragraphs 2 and 3 of said Count One of the Complaint.

4.

Defendant admits that Plaintiffs claim and invoke jurisdiction of this Court under the code sections and Acts of Congress referred to in paragraph 4 of Count One of the Complaint, but Defendant denies that this Honorable Court has jurisdiction of either the subject matter or the parties.

5-13, inclusive.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13 of Count One of the Complaint, and, therefore, each and every allegation contained in all of said paragraphs in Count One of the Complaint are denied.

14.

Defendant denies each and every allegation of paragraph 14 of Count One of the Complaint, except De-

fendant admits that it was engaged, among other activities, in the manufacture for sale and distribution through interstate commerce, of certain chemical compounds and sold and shipped through interstate commerce, to Magnolia Soy Products Company, a chemical solvent, to-wit: trichloroethylene, for use in extracting soybean oil from soybeans.

15 and 16.

Defendant denies each and every allegation contained in paragraphs 15 and 16 of Count One of the Complaint.

17 and 18.

For answer to paragraphs 17 and 18 of Count One of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs 17 and 18 of said Count One, as to the loss of high quality milking cows, losses of milk profits (past, present or prospective), losses of customers and good-will, expenses incurred by the use of veterinarians, and the employment of labor incident to the alleged death and illness of dairy cows, and further general damages, and therefore, all allegations of Plaintiffs in said paragraphs 17 and 18 are denied.

Defendant denies that any and all such alleged losses referred to in paragraphs 17 and 18 of Count One were the result of any negligence of the Defendant, or any act, or failure to act, or violation of any duty, by the Defendant.

19.

Defendant admits that Plaintiffs have made demand upon it prior to the filing of this Complaint for payment of $120,790.00, and admits that Defendant has paid no part thereof and that Defendant has refused to pay said sum or any part thereof; but Defendant denies each and every other allegation contained in said paragraph 19 of Count One of the Complaint.

Answer to Count Two.

First Defense.

Count Two fails to state a claim against this Defendant upon which relief can be granted.

Second Defense.

Now responding to, and following the same numbering of paragraphs of, Count Two of the Complaint, Defendant answers and says:

1.

Defendant, for its answer to paragraph 1 of Count Two of the Complaint, hereby repeats, reiterates and adopts its answers to paragraphs 1 to 14, both inclusive, of Count One of the Complaint.

2 and 3.

Defendant denies each and every allegation contained in paragraphs 2 and 3 of Count Two of the Complaint.

4.

Defendant, for its answer to paragraph 4 of said Count Two of the Complaint, hereby repeats, reiterates and adopts its answer to paragraphs 17, 18 and 19 of Count One of the Complaint, and denies the remainder of said paragraph 4 of Count Two of the Complaint.

Answer to Count Three.

First Defense.

Count Three of the Complaint fails to state a claim against this Defendant upon which relief can be granted.

Second Defense.

Now responding to, and following the same numbering of paragraphs of, Count Three of the Complaint, Defendant answers and says:

1.

Defendant, for its answer to paragraph 1 of Count Three of the Complaint, hereby repeats, reiterates and adopts its answers to paragraphs 1 to 14, both inclusive, of Count One of the Complaint.

2 and 3.

Defendant denies each and every allegation contained in paragraphs 2 and 3 of Count Three of the Complaint.

4.

Defendant, for its answer to paragraph 4 of Count Three of the Complaint, hereby repeats, reiterates and adopts its answers to paragraphs 17, 18 and 19 of Count One of the Complaint, and denies the remainder of paragraph 4 of Count Three of the Complaint.

Answer to Count Four.

First Defense.

Count Four of the Complaint fails to state a claim against this Defendant upon which relief can be granted.

Second Defense.

Now responding to, and following the same numbering of paragraphs of, Count Four of the Complaint, Defendant answers and says:

1.

Defendant, for its answer to paragraph 1 of Count Four of the Complaint, hereby repeats, reiterates and adopts its answers to paragraphs 1 to 13, both inclusive, of Count One of the Complaint.

2 and 3.

Inasmuch as paragraphs 2 and 3 of Count Four of the Complaint allege the existence, not of facts but of statutory law of the Territory of Hawaii and the United States, no answer thereto is required.

4 and 5.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4 and 5 of Count Four of the Complaint, and, therefore, the allegations in said paragraphs 4 and 5 of the said Count are denied.

6.

Defendant denies each and every allegation contained in paragraph 6 of Count Four of the Complaint except Defendant admits that it was engaged, among other activities in the manufacture, for sale and distribution through interstate commerce, of certain chemical compounds and sold and shipped through interstate commerce to Magnolia Soy Products Company, a chemical solvent, to-wit: trichloroethylene, for use in extracting soybean oil from soybeans.

7.

Defendant denies each and every allegation contained in paragraph 7 of Count Four of the Complaint.

8.

Defendant denies each and every allegation contained in paragraph 8 of Count Four of the Complaint.

9 and 10.

Defendant denies each and every allegation contained in paragraphs 9 and 10 of Count Four of the Complaint.

11.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of Count Four of the Complaint, and, therefore, all allegations of the Plaintiffs in said paragraph 11 of Count Four of the Complaint are denied.

12.

Defendant denies each and every allegation contained in paragraph 12 of Count Four of the Complaint.

13.

Defendant denies each and every allegation contained in paragraph 13 of Count Four of the Complaint. It is further specifically denied that any negligence of Defendant (which negligence is denied) was in any way related to or connected with any damage to Plaintiffs and denies that Defendant violated, or failed to perform, any duty owed to the Plaintiffs.

14.

Defendant, for answer to paragraph 14 of Count Four of the Complaint, hereby repeats, reiterates and adopts its answers to paragraphs 17, 18 and 19 of Count One of the Complaint

15.

Defendant denies each and every allegation contained in paragraph 15 of Count Four of the Complaint.

16.

While this paragraph is nothing more than the conclusion of the pleader to which no answer is required, nevertheless, insofar as the same might be deemed proper pleading, the allegations of said paragraph 16 of Count Four of the Complaint are denied

Third Defense

For a third and further defense to the Complaint herein, and to each of the four Counts therein, Defendant alleges that this Court lacks jurisdiction over the person of this Defendant in that this Defendant is a corporation organized under the laws of the State of Delaware and was not and is not subject to service of process within the Northern District of Mississippi

Fourth Defense

For a fourth and further defense to the Complaint herein, and to each of the four Counts therein, Defendant alleges that this Court lacks jurisdiction of the subject matter in that the Plaintiffs are residents and citizens of the Territory of Hawaii and Defendant is a citizen and resident of the State of Delaware, under the laws of which it was and is organized and wherein it has its domicile, the said Defendant not being subject to service of process in the Northern District of Mississippi, and no alleged cause of action accrued unto Plaintiffs in the Northern District of Mississippi, and no act or omission of this Defendant is alleged to have occurred or been made in the Northern District of Mississippi

Fifth Defense.

For a fifth and further defense to the Complaint herein, and to each of the four Counts therein, Defendant alleges that the venue of this action does not lie in the United States District Court for the Northern District of Mississippi, or the Greenville Division therein, but, on the contrary, venue lies, if the suit is maintainable at all, in the United States District Court for the Jackson Division of the Southern District of Mississippi.

And now having answered the Complaint, and each and every Count therein, Defendant prays to be dismissed with costs.

W. C. WELLS, III,
EARL T. THOMAS,
(Earl T. Thomas),
Attorneys for Defendant.

Address of each of above:
900 Lamar Life Building,
Jackson, Mississippi.
CARL E. GEUTHER,
7058 Du Pont Building,
Wilmington, Delaware.
WALTER D. FORD,
7055-A Du Pont Building,
Wilmington, Delaware.
WELLS, THOMAS & WELLS,
900 Lamar Life Building,
Jackson Mississippi.
Of Counsel.

Affidavit of Service.

State of Mississippi,
County of Hinds.

Earl T. Thomas, being by me first duly sworn, states on oath that he has served the foregoing Answer on Counsel for Plaintiffs, by mailing this date, postage prepaid, true copies thereof respectively, to Shiro Kashiwa and Roger E. Brooks, Esqs., 923-20th Street, N.W., Washington, D. C. and Wm. G. Burgin, Jr., Esq., Columbus, Mississippi, Attorneys for the Plaintiffs.

EARL T. THOMAS.
(Earl T. Thomas).

Sworn to and subscribed before me, this January 13th, 1954.

JEWELL BEARD.
(Seal) Notary Public.

My Commission Expires Nov. 4, 1955.

MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANT.

Filed this 9 day of Oct. 1954.

United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as the Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a corporation, Defendant.

To the Honorable Judge of the Above Court:

Defendant moves the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in defendant's favor dismissing the action, on the ground that there is no genuine issue as to any material fact, and that defendant is entitled to a judgment as a matter of law.

This motion is based upon:

(a) The Complaint

(b) Affidavits, attached hereto, of:

(1) Clark B. Shepherd

(2) R. Stuart Armstrong, with attachments.

(3) Charles A. Kline, Jr.
W. C. WELLS, III,
EARL T. THOMAS,
(Earl T. Thomas),
Attorneys for Defendant.

Address of each of above:
900 Lamar Life Building,
Jackson, Mississippi.
CARL E. GEUTHER,
7100 Du Pont Building,
Wilmington, Delaware.
WALTER D. FORD,
7055-A Du Pont Building,
Wilmington, Delaware.
WELLS, THOMAS & WELLS,
900 Lamar Life Building,
Jackson, Mississippi,
Of Counsel.

NOTICE OF MOTION

To: Roger E. Brooks, Esq.,
923—20th Street, N. W.,
Washington, D. C.
Shiro Kashiwa, Esq.,
Hawaiian Trust Building,
Honolulu, T. H.
Wm. G. Burgin, Jr., Esq.,
Columbus, Mississippi.
Attorneys for the Plaintiffs:

Please take notice, that the undersigned will bring the above Motion on for hearing before this Court.

Honorable Allen Cox, Presiding, in the Courtroom, United States Court House, Post Office Building, Oxford, Mississippi, on the 17th day of November, A. D. 1954, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

EARL T. THOMAS,
(Earl T. Thomas),
Attorney for Defendant.

Address:
900 Lamar Life Building,
Jackson, Mississippi.
CARL E. GEUTHER,
7100 Du Pont Building,
Wilmington, Delaware.
WALTER D. FORD,
7055-A Du Pont Building,
Wilmington, Delaware.
WELLS, THOMAS & WELLS,
900 Lamar Life Building,
Jackson, Mississippi,
Of Counsel for Defendant.

Affidavit of Service.

State of Mississippi,
County of Hinds.

Earl T. Thomas, being by me first duly sworn, states on oath that he has served the foregoing Motion for Summary Judgment on behalf of Defendant and Notice of Motion on Counsel for Plaintiffs by mailing this date, postage prepaid, true copies thereof, respectively, to Roger E. Brooks, Esq., 923—20th Street, N. W., Washington, D. C., Shiro Kashiwa, Esq., Hawaiian Trust Building, Honolulu, T. H., and

Wm. G. Burgin, Jr., Esq., Columbus, Mississippi, Attorneys for the Plaintiff.

EARL T. THOMAS,
(Earl T. Thomas).

Sworn to and subscribed before me, this the 8th day of October, A. D. 1954.

JOE JACK HURST,
(Seal) Notary Public in and for
Hinds County, Mississippi.

My Commission Expires Jan. 14, 1958.

In the United States District Court for the Northern District of Mississippi.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Affidavit of Clark B. Shepherd.

State of Delaware,
County of New Castle. ss.

Clark B. Shepherd, being duly sworn according to law, deposes and says: that he is employed by the defendant, E. I. du Pont de Nemours & Company, in the capacity of Manager of the Chlorine Products Division of the Electrochemicals Department and in such capacity is fully conversant and familiar with sales of trichlorethylene made by the Company, and the matters hereinafter deposed to: that he has held

such position since 1947 and was actively engaged in the selling of certain chemical products, including trichloretnylene, during 1951 and 1952; that his department was and is the only department of the defendant E. I. du Pont de Nemours & Company engaged in the manufacture and/or sale of trichlorethylene which is the sole chemical product mentioned or complained of by plaintiffs; that at no time during said years was the defendant E. I. du Pont de Nemours & Company engaged in the manufacture, offering for sale, or sale of soybean oil meal for any purpose; that no soybean oil meal was ever sold directly, indirectly or otherwise, by said defendant E. I. du Pont de Nemours & Company to the plaintiffs, George T. Nishida and James E. Nishida, doing business as the Hilo Dairy; that at no time, and with particular reference to 1951 and 1952, was any trichlorethylene sold to said plaintiffs by the said defendant E. I. du Pont de Nemours & Company; that no contractual relations were set up, maintained or developed between his department of the defendant E. I. du Pont de Nemours & Company and plaintiffs, and that no contact of any kind existed or took place between his department and the plaintiffs; that no representations were made by the defendant E. I. du Pont de Nemours & Company to the plaintiffs as to the merchantability, suitability, fitness for particular purpose or of any other kind with respect to soybean oil meal or any products of his department and especially trichlorethylene; that the plaintiffs, or either of them, did not rely and could not have relied upon any representation, statement, act or warranty by representatives of his department with respect to soybean oil meal, trichlorethylene or other products.

That prior to July, 1951, trichlorethylene was offered for sale and sold by his department for multiple purposes, including the prepration of soybean oil meal for cattle feed; that on July 31, 1951 he prepared a letter addressed to, inter alia, the Magnolia Soy Products Company at Greenville, Mississippi, (and all other known soybean meal processors using the chemical product trichlorethylene purchased from E. I. du Pont de Nemours & Company) in the following words:

"July 31, 1951

Mr. Lyman Reed, Sales Manager
Magnolia Soy Products Company
Greenville, Mississippi

Dear Mr. Reed:

In recent months, there have been increasing indications that trichlorethylene-extracted soybean meal may be associated with a hemorrhagic disease in cattle which has been observed in widely-scattered areas. Research programs are now being undertaken by the University of Minnesota and Iowa State College to investigate the nature and causes of the disease and to determine if trichlorethylene-extracted meal is, in fact, a contributory factor.

The cause of the disease is unknown. The evidence that trichlorethylene-extracted meal is associated in any way with the disease is entirely circumstantial, but the most recent reports have all come from farms using this type of meal in their cattle feed. Thus, despite the satisfactory experience with trichlorethylene-extracted meal in the past, we cannot ignore the possibility that this meal under certain conditions, perhaps in combination with one or more other factors, may be associated with the particular hemor-

rhagic disease observed in Minnesota and other scattered points.

In view of the present uncertainty, we strongly recommend that sales of trichlorethylene-extracted meal be confined to outlets other than cattle feed until more definite information is available from the investigations now underway in Minnesota and Iowa. To the best of our knowledge, the hemorrhagic disease in question is peculiar to cattle only, and all the available evidence and experience indicates that trichlorethylene-extracted meal is entirely satisfactory as a component for feeding hogs and poultry.

Very truly yours,

(S.) C. B. SHEPHERD,

(C. B. Shepherd),

Manager, Chlorine Products Division".

CBS/a

That the said letter was delivered pursuant his instructions by R. Stuart Armstrong, an employee of E. I. du Pont de Nemours & Company under his supervision to said Magnolia Soy Products Company on August 3, 1951 and that thereafter no sales of trichlorethylene were made to the said Magnolia Soy Products Company or any other purchaser for the purpose of manufacturing or processing soybean oil meal for cattle feed; that while he has no personal knowledge of the alleged purchases by the plaintiffs of soybean oil meal from others, he is advised that they are alleged to have been made from divers other parties during October, November, December of 1951 and January and February of 1952, at which time the said defendant E. I. du Pont de Nemours & Company had long since desisted from any sales of trich-

lorethylene for the purpose of processing such soybean oil meal for cattle feed purposes.

CLARK B. SHEPHERD,
(Clark B. Shepherd).

Subscribed and sworn to before me this 21st day of September A. D. 1954.

MILDRED V. KERSHAW,
(Seal) Notary Public in and for the County of New Castle, State of Delaware.

My commission expires Feb. 5, 1955.

In the United States District Court for the Northern District of Mississippi.

Affidavit of R. Stuart Armstrong.

George T. Nishida and James E. Nishida, doing business as the Hilo Dairy Company of Kauai, a copartnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a corporation, Defendant.

State of Delaware,
County of New Castle. ss.

R. Stuart Armstrong, being duly sworn according to law, deposes and says: that he is employed by the defendant, E. I. du Pont de Nemours & Company in the Electrochemicals Department and that he is fully conversant and familiar with the matters hereinafter deposed to; that during the years 1951 and 1952

he was under the supervision of Clark B. Shepherd in the Chlorine Products Division of that Department in the capacity of a technical sales representative; that acting under the instructions of his superior, Clark B. Shepherd, he personally delivered to the Magnolia Soy Products Company at Greenville, Mississippi, and to all other known soybean processors using the chemical product trichlorethylene, which had been purchased from E. I. du Pont de Nemours & Company, a letter bearing date July 31, 1951, and over the signature of the said Clark B. Shepherd; that the said letter addressed to Magnolia Soy Products Company was delivered by him to that company at Greenville, Mississippi, on August 3, 1951, and was handed personally to L. L. Ford, Vice-President, and Lyman Reed, Secretary and Sales Manager, at the company offices therein situate; that the letter is as follows:

"July 31, 1951

Mr. Lyman Reed, Sales Manager
Magnolia Soy Products Company
Greenville, Mississippi

Dear Mr. Reed:

In recent months, there have been increasing indications that trichloroethylene-extracted soybean meal may be associated with a hemorrhagic disease in cattle which has been observed in widely-scattered areas. Research programs are now being undertaken by the University of Minnesota and Iowa State College to investigate the nature and causes of the disease and to determine if trichloroethylene-extracted meal is, in fact, a contributory factor.

The cause of the disease is unknown. The evidence that trichloroethylene-extracted meal is associated in

any way with the disease is entirely circumstantial, but the most recent reports have all come from farms using this type of meal in their cattle feed. Thus, despite the satisfactory experience with trichloroethylene-extracted meal in the past, we cannot ignore the possibility that this meal under certain conditions, perhaps in combination with one or more other factors, may be associated with the particular hemorrhagic disease observed in Minnesota and other scattered points.

In view of the present uncertainty, we strongly recommend that sales of trichloroethylene-extracted meal be confined to outlets other than cattle feed until more definite information is available from the investigations now underway in Minnesota and Iowa. To the best of our knowledge, the hemorrhagic disease in question is peculiar to cattle only, and all the available evidence and experience indicates that trichloroethylene-extracted meal is entirely satisfactory as a component for feeding hogs and poultry.

Very truly yours,

(S.) C. B. SHEPHERD,

(C. B. Shepherd),

Manager, Chlorine Products Division".

CBS/a

that deponent was a witness who testified in that certain case of E. I. Du Pont de Nemours v. Frank Lander (Case No. 39,116 of the Supreme Court of Mississippi) the opinion of which is reported in 73 So. (2nd) 249 (Vol. 2 of Advanced Sheets of July 15, 1954 for Vol. 73 (2nd) of Southern Reporter), a certified copy of which is attached hereto and marked Exhibit "A", during the trial of which there was in-

troduced into evidence the original of said letter so then delivered by affiant to said Magnolia Soy Products Company, which letter appears as "Exhibit G-21 Deft. Test. S. Armstrong" on page 467 of the Record on appeal, a certified copy of which is attached hereto as Exhibit "B" and made a part hereof.

R. STUART ARMSTRONG,
(R. Stuart Armstrong).

Subscribed and sworn to before me this 21st day of September, 1954.

MILDRED V. KERSHAW,
(Seal) Notary Public in and for the State and County aforesaid.

My commission expires Feb. 5, 1955.

EX. A.

In the Supreme Court of Mississippi.

E. I. Du Pont de Nemours & Company,
vs. No. 39,116.
Frank Ladner.

Kyle, Justice:

Frank Ladner, as plaintiff, recovered a judgment in the Circuit Court of Pearl River County against E. I. Du Pont de Nemours and Company, defendant, for the sum of $1,793; and from that judgment the defendant prosecutes this appeal.

The declaration was filed by the plaintiff on July 25, 1952, against Magnolia Soy Products Company, a

corporation domiciled at Greenville, Mississippi, and E. I. Du Pont de Nemours and Company, a Delaware Corporation, as defendants. The plaintiff alleged in his declaration that during the month of December 1951 he purchased from L. J. Thigpen, a retail merchant, engaged in the business of selling cattle feed in the Town of Poplarville, several sacks of soybean meal to be used in feeding the plaintiff's dairy cattle; that he fed the meal to his dairy cattle, and that five of his cows sickened and died as a result of eating the meal. One other cow became sick, and her value as a milch cow was destroyed. The plaintiff alleged that the meal had been processed by the Magnolia Company, which owned and operated a plant at Greenville, and that Magnolia had used in the processing of the meal a chemical compound known as trichloroethylene, a compound manufactured and sold by the defendant Du Pont for use by manufacturers of soybean meal as a solvent in extracting oil from the soybeans. The plaintiff alleged that the processing of soybean meal by the use of trichloroethylene rendered the meal poisonous and unfit for cattle feed; that both Magnolia and Du Pont knew, or by the exercise of reasonable care should have known, that the processing of soybean meal by the use of trichloroethylene as a solvent would make the meal unfit for use as cattle feed; that Du Pont had recommended and sold the chemical to Magnolia as a solvent to be used in the manufacture of soybean meal, knowing that the meal was to be used as food for cattle; that both defendants had breached their duties to the plaintiff and were guilty of negligence which proximately caused the death of the plaintiff's cattle.

Before the case was tried Magnolia effected a settlement of its liability for the sum of $675, and the plaintiff dismissed his suit against Magnolia

In his declaration the plaintiff alleged that the defendant Du Pont owed to the plaintiff as a purchaser of soybean meal manufactured by Magnolia by the use of trichloroethylene the duty to inform the plaintiff, Magnolia, or the general public of the fact that trichloroethylene, when used as a processing agent for the manufacture of soybean meal, rendered the meal poisonous and unfit for use as food for cattle, and the duty not to introduce said chemical compound and offer the same for sale in interstate commerce for use as a solvent in the manufacture of soybean meal to be fed to cattle.

The defendant Du Pont in its answer admitted that it was engaged in the business of manufacturing and selling trichloroethylene, and that it had sold said product in interstate commerce to Magnolia to be used in extracting soybean oil from soybeans; but the defendant denied the other allegations of the plaintiff's declaration, and averred that the declaration failed to state a claim against the defendant upon which relief could be granted.

Ladner testified that he owned about 40 head of cattle and that he was milking 20 cows at the time that he purchased the soybean meal. After purchasing the soybean meal he fed the cows daily a mixture of soybean meal and crushed corn, wheat shorts and beet pulp. About four weeks after he began feeding the soybean meal to the cattle, the cattle quit eating; their eyes became bloodshot; there was bleed-

ing from the nostrils, some of them passed blood from their udders. Five of the cows died and one other cow was ruined for a dairy cow. Several other witnesses who had purchased soybean meal from L. J. Thigpen about the same time, testified that their cattle had been affected in a similar manner. Dr. Vernon D. Chadwick, Executive Officer of the Livestock Sanitary Board, testified that he was notified of the diseases among the cattle in Pearl River County about December 21st. He made an immediate visit to the county and examined the diseased cattle on several farms. The animals appeared to be affected alike. The symptoms common to all seemed to be a weak and wobbly gait, hemorrhaging of the mucous membrane around the eyes and in the tail region. Some of the animals showed signs of diarrhea with a bloody tinge to the feces. Some of the animals showed two or three degrees of temperature. Dr. Chadwick testified that in his opinion soybean meal which had been processed by the use of trichloroethylene as a solvent, if fed to cattle over a considerable period of time, would eventually cause death; and that in his opinion the feeding of the tri-extracted soybean meal to the cattle which he had examined in Parl River County caused the death of the cattle.

Dr. Raymond T. Vaughn of the Barrow-Agee Laboratories of Memphis, Tennessee, testified that he had analyzed a sample of the soybean meal which had been sent to him by the law firm of Williams and Williams, of Poplarville, Mississippi, in September 1952, and that he had found that the meal contained a trace of trichloroethylene in a quantity of three parts per million. He stated that he did not know whether that amount of trichloroethylene was poison-

ous to cattle or not. He had no experience in solvent extractions and he knew nothing about the manufacture of soybean meal. Dr. G. Worthen Agee, a qualified chemist of the Barrow-Agee Laboratories, testified that he was not familiar with the technical phases of extracting soybean meal by the trichloroethylene process; but he knew that trichloroethylene had been used by the soybean industry as a solvent in extracting oil. He had read a good deal of literature on the poisonous effects on cattle of soybean meal extracted by the use of trichloroethylene. He stated that the first reference to the subject in point of time was contained in an article by Sir Stewart Stockman, of the Board of Agriculture and Fisheries, published in 1916. Stockman reported in that article that widespread deaths among cattle had occurred in southern Scotland, and that the deaths were caused by feeding soybean meal produc[illegible] by trichloroethylene extraction. Agee also stated tha[illegible] there were outbreaks of diseases among cattle in Germany, France and Holland during the early twenties, all of which were traced to the feeding of soybean meal produced by trichloroethylene extraction method. From his study of the subject the witness could say that "soybean meal produced by the process of extracting the beans with trichloroethylene has killed cattle in numerous instances and the meal can be regarded as extremely poisonous." He stated that in his opinion the amount of the residual trichloroethylene in the meal was not important. The important factor is that the meal has been produced by that process. He stated that the tri-processed soybean meal seemed to be poisonous only to ruminants or cud-chewing animals. Swine seemed to thrive on it.

L. L. Ford, who supervised the construction of the Magnolia plant during the fall and winter of 1950-1951, testified that he visited other plants using trichloroethylene as a solvent prior to the construction of the Magnolia plant and made contacts with Du Pont as the producer of the trichloroethylene solvent. He stated that Du Pont's representatives furnished information concerning the use of the solvent in the processing of soybean meal, and advice concerning the erection and equipment of the plant. R. Stewart Armstrong, a solvents technician of Du Pont, visited the plant at frequent intervals as the work was nearing completion. Ford stated that he followed the directions given to him by Du Pont's representative in all matters relating to the erection of the plant and the installation of proper machinery, and that he read all of the literature sent to him by Du Pont on the subject of manufacturing soybean meal by the use of trichloroethylene as an oil extraction solvent. The plant was completed and manufacturing operations were commenced about March 15, 1951. Operations were discontinued sometime during the month of May and were not resumed until October.

The carload of meal which Thigpen purchased from Magnolia was purchased during the fall of 1951 and was received by Thigpen about November 11. Ford stated that the meal was processed from the 1951 soybean crop; and it appears from the record that the trichloroethylene used in processing the meal was a part of a shipment of trichloroethylene received from Du Pont during the month of May. No other shipment of trichloroethylene was made by Du Pont to Magnolia until sometime during the month of November.

In the meantime, Du Pont had become alarmed during the early summer because of the outbreak of a hemorrhagic disease among cattle in Minnesota on farms using only tri-extracted soybean meal; and on July 31, 1951, Du Pont wrote a letter to Magnolia strongly recommending that sales of tri-extracted meal be confined to outlets other than cattle feed until more definite information was available from investigations then under way. The investigations referred to were investigations undertaken by Du Pont and the University of Minnesota. Du Pont contributed several thousand dollars to help finance the study. On July 31, 1951, Du Pont issued its letter of warning to all manufacturers of soybean meal who were using trichloroethylene as a solvent recommending that the sales of tri-extracted meal be confined to outlets other than cattle feed, until more definite information concerning the causes of the disease was available, and in October 1951 the National Soybean Processors' Association issued a notice to the trade recommending that tri-processed meal be so labeled and not be used for cattle feed.

The letter issued by Du Pont to Magnolia, dated July 31, 1951, was addressed to Lyman Reed, Sales Manager of the Magnolia Company, and was delivered to Lyman Reed and L. L. Ford personally by R. Stewart Armstrong on August 3, 1951. The letter was signed by C. B. Shepherd, Manager of the Chlorine Products Division of the Du Pont company, and was as follows:

"July 31, 1951

"Mr. Lyman Reed
Magnolia Soy Products Co.
Greenville, Mississippi

Dear Mr. Reed:

In recent months, there have been increasing indications that trichloroethylene-extracted soybean meal may be associated with a hemorrhagic disease in cattle which has been observed in widely-scattered areas. Research programs are now being undertaken by the University of Minnesota and Iowa State College to investigate the nature and causes of the disease and to determine if trichloroethylene-extracted meal is, in fact, a contributory factor.

The cause of the disease is unknown. The evidence that trichloroethylene-extracted meal is associated in any way with the disease is entirely circumstantial, but the most recent reports have all come from farms using this type of meal in their cattle feed. Thus, despite the satisfactory experience with trichloroethylene-extracted meal in the past, we cannot ignore the possibility that this meal under certain conditions, perhaps in combination with one or more other factors, may be associated with the particular hemorrhagic disease observed in Minnesota and other scattered points.

In view of the present uncertainty, we strongly recommend that sales of trichloroethylene-extracted meal be confined to outlets other than cattle feed until more definite information is available from the investigations now underway in Minnesota and Iowa. To the best of our knowledge, the hemorrhagic disease in question is peculiar to cattle only, and all the available evidence and experience indicates that

trichloroethylene-extracted meal is entirely satisfactory as a component for feeding hogs and poultry.'

Very truly yours,

(S.) C. B. SHEPHERD,

Manager, Chlorine Products Division".

Ford testified that the above mentioned letter was delivered to Lyman Reed in his presence on or about August 2, 1951. Ford stated that he and Reed read the letter immediately and became very much disturbed. He stated that he said to Armstrong: "90 per cent of our business is cattle feed and we can't sell a car a year other than for cattle feed, and now you tell us not to sell any more for cattle feed", and Armstrong said, "I didn't say that." Ford stated that he told Armstrong that Magnolia could not operate unless they sold soybean meal for cow feed. He stated that Magnolia ordered another shipment of trichloroethylene later in the year, and the shipment was received during the latter part of November.

R. Stewart Armstrong testified that he delivered letters similar to the above letter to all manufacturers of soybean meal who were using trichloroethylene as a solvent in the processing of the meal. Armstrong stated that there were eight mills that were using trichloroethylene for the extraction of oils from soybeans in 1951. Only one such mill was using trichloroethylene at the time of the trial, and its output was not being sold as cattle feed, but was being used for the feeding of chickens. Armstrong's testimony indicated that Du Pont was acquainted with the article published by Sir Stewart Stockman in 1916, and the problems that had been encountered in Germany, Holland and Belgium during the twenties. Du Pont

was also aware of the appearance of the disease in Colorado and Iowa in 1949.

The first point argued by the appellant's attorneys as ground for reversal on this appeal is that the record shows that the plaintiff's damage was not proximately caused by any negligence on the part of the defendant Du Pont and that the defendant cannot be held legally liable for such damage. The appellant says that, if it be conceded that the proof was sufficient to show that Du Pont was negligent in selling trichloroethylene to Magnolia for use in processing soybean meal for cattle feed, and if it be conceded that the sale and shipment in interstate commerce of trichloroethylene for use in processing soybean meal for cattle feed constituted a violation of the Federal Food, Drug and Cosmetic Act, the negligence of Du Pont in selling such chemical compound to Magnolia for use in processing soybean meal for cattle feed was abrogated by the letter written by Du Pont to Magnolia on July 31, 1951, and delivered by R. Stuart Armstrong to Reed and Ford in person approximately three months prior to the shipment of the car load of meal by Magnolia to Thigpen during the latter part of November, 1951. The appellant contends that the act of Magnolia in selling tri-extracted soybean meal for cattle feeding purposes after the receipt of Du Pont's warning letter was an independent intervening act which broke the chain of causation, in that Du Pont's negligence was no longer operative after the delivery of the above mentioned warning letter and the negligence of Magnolia in selling the tri-extracted soybean meal to Thigpen for cattle feeding purposes after receipt of the warning letter was the sole proximate cause of the death of the plaintiff's cattle.

The genral rule relating to the liability of a manufacturer for negligence to remote vendees or other third persons with whom he has had no contractual relations is stated in 65 C.J.S., 619, Negligence, par. 100a, as follows:

"it is a general rule that a manufacturer or seller of an article is not liable to a third person, who has no contractual relation with him, for negligence in the manufacture or sale of the article. This rule has been said to be the early general rule in this country, and has been said to have been abolished or abandoned in some jurisdictions. There are also well-recognized exceptions to the rule, as where the article causing the injury is inherently or imminently dangerous in kind, as discussed infra subdivision b of this section, or where the thing causing the injury is not imminently dangerous in kind, but is rendered dangerous by reason of some defect, infra subdivision c of this section, and it has been said that there has been a general tendency on the part of the Courts to broaden the exceptions."

Poisonous or dangerous drugs, as well as dangerous chemicals, are familiar examples of substances recognized as inherently dangerous within the meaning of the rule stated above. It is generally conceded that unwholesome or contaminated foods or beverages intended for human consumption are imminently dangerous, and an ultimate consumer may bring an action directly against a negligent manufacturer or packer for injuries resulting from the use of such dangerous articles, though there is no contractual relation between the parties. Jackson Coca Cola Bottling Co. v. Chapman, 196 Miss. 864, 64 So. 791, Pillars v. R. J. Reynolds Tobacco Co., 117 Miss. 490, 78 So

365; Coca Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305; Chenault v. Houston Coca Cola Bottling Co., 151 Miss. 367, 118 So. 177; Bufkin v. Grisham, 157 Miss. 746, 128 So. 563; Coca Cola Bottling Works v. Simpson, 158 Miss. 390, 130 So. 479, 72 A.L.R. 143; Curtiss Cando Co. v. Johnson, 163 Miss. 426, 141 So. 762; Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726. See Anno. 17 A.L.R. 688; 39 A.L.R. 995; 63 A.L.R. 343; 88 A.L.R. 350; 142 A.L.R. 1491.

The appellee contends that the rule of liability applied in the cases cited above should be applied in cases involving the manufacture of animal foods. The appellant contends, however, that the distinctive rule that has been applied in cases of manufacturers or packers of foods and beverages intended for human consumption is not applicable in cases involving animal foods, where the damages sued for are damages to property and not for personal injuries; and the appellant cites in support of its contention the case of Windram Mfg. Co. v. Boston Blacking Co. (1921), 239 Mass. 123, 131 N.E. 454, 17 A.L.R. 669, wherein the Court said: "No authority has been called to our attention which imposes a common law duty of care toward strangers to the contract, upon the maker of an article which is not inherently dangerous, but is likely to cause a loss to property because of careless preparation." But in so far as the Windram case states and relies upon any "general rule" of nonliability of a manufacturer for negligence, it may be regarded as repudiated by the decision in Carter v. Yardley & Company, Ltd., 319 Mass. 92, 64 N.E. 2d 693, 164 A.L.R. 559; and whether the specific holding of the Windram case would stand under the view now adopted in Massachusetts is open to serious question. See Note 164 A.L.R. 569, 594.

Whatever the rule may have been originally, the principle seems now to be well established by the decisions of many Courts that a person who has had no direct contractual relations with a manufacturer may nevertheless recover from such manufacturer for damages to property caused by the negligence of the manufacturer in the same manner that such a remote vendee or other third person can recover for personal injuries. "The modern doctrine may be regarded as allowing recovery for injury or damage to property in all instances where a case in tort law of negligence can be made out against the manufacturer—that is, where the requisite elements of foreseeability and breach of duty are established, where the manufacturer can be found to have been negligent, and such negligence was the proximate cause of the property damage." Anno. 164 A.L.R., 593. See Ellis v. Lindmark (1929), 177 Minn. 390, 225 N.W. 395; Hunter v. Allied Mills (1937), 184 S.C. 330, 192 S.E. 356; Ebers v. General Chemical Co. (1945), 310 Mich. 261, 17 N.W. 2d 176, E. I. Du Pont de Nemours & Co. v. Barndon (1934, C.C.A. 8th Ct.), 73 F. 2d 26

However, it is not necessary for us to undertake to determine at this time whether or not the rule of legal liability applied by our own Court in the cases involving manufacturers of foods and beverages intended for human consumption should be applied in cases involving manufacturers of animal foods. Neither is it necessary for us to undertake to define the exact limits of legal liability of a manufacturer of a chemical compound, which may be harmless, or beneficial when properly used for its intended purpose but is likely to cause injury when improperly used, or when used for an improper purpose, who undertakes to direct or recommend the manner in which or the

purposes for which such chemical compound shall be used but fails to exercise reasonable care commensurate with the dangers involved in giving such directions and making such recommendations.

We think that the proof in this case fails to show that DuPont's negligence was the proximate cause of the injury to the plaintiff's cattle. If Du Pont is to be held liable in a case of this kind, such liability must be predicated upon Du Pont's failure to exercise due care in warning Magnolia of the danger incident to the use of trichloroethylene as a solvent in the processing of soybean meal for cattle feed. But the proof shows that Du Pont did warn Magnolia if the dangers incident to the use of trichloroethylene as a solvent in the manufacture of soybean meal for cattle feed approximately three months prior to the date of the sale of the carload of meal to Thigpen; and even though it may appear that Du Pont should have warned Ford and his associates prior to August 3, 1951, it cannot be said that Du Pont's failure to give such warning at an earlier date was the proximate cause of the death of the plaintiff's cattle.

After a careful examination of the record in this case, we think that the act of Magnolia in selling the trichloroethylene extracted soybean meal for cattle feed after the receipt of the Du Pont warning letter of July 31, 1951, was an intervening act sufficient to break the chain of casual relationship between Du Pont's negligence and the injury to the plaintiff's cattle.

The record shows that trichloroethylene was a solvent used for many purposes. It had many legitimate uses. If Du Pont owed a duty to Magnolia and

the plaintiff as a user of Magnolia's products to warn Magnolia of the dangers incident to the use of trichloroethylene as a solvent in the manufacture of soybean meal for cattle feed, Du Pont discharged that duty by writing and delivering to Magnolia the warning letter dated July 31, 1951. The warning letter was specific and its meaning clear; and Du Pont was not liable for Magnolia's failure to heed that warning.

"One who acts negligently is not bound necessarily to anticipate that another person will be negligent after the latter has discovered the danger arising from the former's negligence. The first actor, however, is not permitted to assume that the second actor will discover the danger caused by the first actor's negligence. Accordingly, where the second actor after having become aware of the existence of a potential danger created by the negligence of the first actor, acts negligently in respect of the dangerous situation and thereby brings about an accident with injurious consequences to others, the first actor is relieved of liability, because the condition created by him was merely a circumstance and not the proximate cause of the accident." 38 Am. Jur. 731, Negligence, par. 72.

After R. Stewart Armstrong had delivered Du Pont's warning letter to Ford and Reed on August 3, 1951, Du Pont had a right to believe that Magnolia would confine its sales of tri-extracted soybean meal to outlets other than cattle feed until more definite information was available from the investigations then under way. Du Pont had a right to believe that the warning letter would not be disregarded; and we think that Magnolia's conscious act in refusing to heed the warning and in selling the carload of tri-extracted soybean meal to Thigpen for cattle feeding

purposes after being apprised of the potential danger, constituted an independent, efficient intervening cause, which was not foreseeable by Du Pont, or, in other words, constituted a superseding cause of the injury operating to eliminate Du Pont's responsibility for its original negligence, if there was such negligence in fact. Wissman v. General Tire Co. of Philadelphia, Inc., 192 Atl. 633, 327 Pa. 215, (Pa. S. Ct. 1937); Kapp v. E. I. Du Pont de Nemours & Co., 57 F. Supp 32 (1944); Foster v. Ford Motor Co. (1926), 139 Wash. 341, 46P945; Catlin v. Union Oil Co. (1916), 31 Cal. App. 597, 161 P. 29; Harper v. Remington Arms. Co., 280 N.Y.S. 862; Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W. 2d 840, 852, 164 A.L.R 364; Mississippi City Lines, Inc., v. Bullock et al., 194 Miss. 630, 13 So. 2d 34; Stewart v. Kroger Grocery, etc., Co., 198 Miss. 371, 21 So. 2d 912.

We do not think that the statements alleged to have been made by R. Stewart Armstrong to Ford and Reed at the time he delivered the warning letter to Ford and Reed detracted from the force of the warning letter. Magnolia did not manufacture soybean meal for Du Pont. Magnolia was an independent manufacturer of soybean products and was in a position to exercise its own judgment in the sale of its products to distributors for resale to ultimate consumers.

In view of the conclusions that we have reached on the question of proximate cause, it is not necessary for us to consider the question as to whether the Federal Food, Drug and Cosmetic Act was applicable to the sale of trichloroethylene by Du Pont to Magnolia.

"It is not material whether the negligence complained of in an action was the violation of a duty imposed by the common law or the violation of one imposed by a statute or ordinance, so far as concerns the requirement that negligence must have been the proximate cause of the plaintiff's injury to warrant a recovery. * * * If the violation of the statute or ordinance by the defendant was not the direct and proximate cause of the accident, he is not liable for the injury of which complaint is made." 38 Am. Jur. 837, Negligence, par. 166.

For the reasons stated above the judgment of the lower Court is reversed and judgment will be entered here in favor of the appellant.

Reversed and Judgment Rendered for Appellant.

All Justices Concur, Except Hall J., who Took No Part.

Certificate of Clerk.

State of Mississippi,
County of Hinds. ss.

I, Tom Q. Ellis, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the annexed and foregoing constitutes and is a true copy of the Opinion rendered by the Supreme Court of Mississippi on June 14, 1954, in that certain cause heretofore pending in said Court numbered 39,116, entitled "E. I. Du Pont de Nemours & Company, vs. Frank Ladner", which said Opinion is now reported in 73 So.2d pp. 249-256, and which said Opinion is now on file and of record in my office and in my custody,

and which said Cause No. 39,116 was an appeal from the Circuit Court of Pearl River County, Mississippi.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at Jackson, Mississippi, this the 21st day of September, 1954.

TOM Q. ELLIS,
Clerk of the Supreme Court
of the State of Mississippi,
By JULIA KENDRICK,
(Seal) D. C.

EX. B.

Established 1802

E. I. du Pont de Nemours & Company
Incorporated

Wilmington 98, Delaware

Electrochemicals Department

July 31, 1951

Mr. Lyman Reed, Sales Manager
Magnolia Soy Products Company
Greenville, Mississippi

Dear Mr. Reed:

In recent months, there have been increasing indications that trichlorethylene-extracted soybean meal may be associated with a hemorrhagic disease in cattle which has been observed in wide-scattered areas. Research programs are now being undertaken

by the University of Minnesota and Iowa State College to investigate the nature and causes of the disease and to determine if trichlorethylene-extracted meal is, in fact, a contributory factor.

The cause of the disease is unknown. The evidence that trichlorethylene-extracted meal is associated in any way with the disease is entirely circumstantial, but the most recent reports have all come from farms using this type of meal in their cattle feed. Thus, despite the satisfactory experience with trichlorethylene-extracted meal in the past, we cannot ignore the possibility that this meal under certain conditions, perhaps in combination with one or more other factors, may be associated with the particular hemorrhagic disease observed in Minnesota and other scattered points.

In view of the present uncertainty, we strongly recommend that sales of trichlorethylene-extracted meal be confined to outlets other than cattle feed until more definite information is available from the investigations now underway in Minnesota and Iowa. To the best of our knowledge, the hemorrhagic disease in question is peculiar to cattle only, and all the available evidence and experience indicates that trichlorethylene-extracted meal is entirely satisfactory as a component for feeding hogs and poultry.

Very truly yours,

C. B. SHEPHERD,

(C. B. Shepherd),

Manager, Chlorine Products Division.

CBS/a

Certificate of Clerk.

State of Mississippi,
County of Hinds. ss.

I, Tom Q. Ellis, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that the annexed and foregoing is a true, perfect, complete, and correct copy of "Ex G—21—Deft. Test. of Armstrong" appearing as Page 467 of the Record on Appeal in that certain cause heretofore pending in the Supreme Court of Mississippi numbered 39,116, entitled "E. I. Du Pont de Nemours & Company vs. Frank Ladner", which said Record on Appeal is on file and of record in my office and in my custody, and which said cause was an appeal from the Circuit Court of Pearl River County, Mississippi.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at Jackson, Mississippi, this the 21st day of September, 1954.

TOM Q. ELLIS,
Clerk of the Supreme Court
of the State of Mississippi,
By JULIA KENDRICK,
D. C.

(Seal)

United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as the Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142

E. I. Du Pont de Nemours & Company, a corporation, Defendant.

Affidavit of Charles A. Kline, Jr.

State of Delaware,
County of New Castle. ss.

Charles A. Kline, Jr. being duly sworn according to law, deposes and says: that he is employed by E. I. Du Pont de Nemours & Company in the capacity of Assistant-Treasurer of the Company, and that he is fully conversant and familiar with the matters hereinafter deposed to; that accounts receivable and other evidences of cash and credit sales come within the supervision of his department and are under his direction and control; that he has examined or caused to be examined the records of all transactions, either on a cash or credit basis, during the years 1951 and 1952; that the said George T. Nishida and James E. Nishida, doing business as the Hilo Dairy Company of Kauai, plaintiff, made no purchases of any kind from the said defendant, E. I. du Pont de Nemours & Company, during these years and there are no trade balances indicated on the said records in any way involving, designating or naming the said George T. Nishida and James E. Nishida, doing business as the Hilo Dairy Company of Kauai.

plaintiff, as a customer or otherwise during the said years.

CHARLES A. KLINE, JR.,
(Charles A. Kline, Jr.).

Subscribed and sworn to before me this 29th day of September, 1954.

L. B. GORMAN,
(Seal) Notary Public in and for the State and County aforesaid.

ORDER DENYING DEFENDANT'S MOTION.

In the United States District Court for the Northern District of Mississippi, Greenville Division.

Geroge T. Nishida and James E. Nishida, doing business as the Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a corporation, Defendant.

This cause having come before the Court upon defendant's motion for summary judgment under Rule 56, Federal Rules of Civil Procedure and the Court having heard argument of counsel for the defendant and plaintiff and being fully advised in the premises, it is, this 18 day of January, 1955,

Ordered, that defendant's motion for summary judgment is denied.

ALLEN COX,
Judge.

Seen, and Approved as to Form Only:
CARL E. GEUTHER,
(Carl E. Geuther),
By E. T. T.
WALTER D. FORD,
(Walter D. Ford),
By E. T. T.
WELLS, THOMAS & WELLS,
By EARL T. THOMAS,
(Earl T. Thomas),
Attorneys for Defendant.
C. O. B.-1, Page 249.

MOTION FOR JOINT TRIAL AND CONSOLIDATION UNDER RULE 42 (a) Federal Rules of Civil Procedure.

Filed this 17 day of Nov. 1955.

In the United States District Court for the Northern District of Mississippi.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,

v. Civil Action No. 145.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Fred L. Waldron, Limited, Plaintiff,

v. Civil Action No. 143.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Come now each of the plaintiffs in the above-mentioned cases and hereby move for an order for joint trial and consolidation of all three causes on the following grounds:

1. That in all three actions there are common questions of law and fact;

2. That by joint trial and consolidation unnecessary costs and delay would be avoided;

3. That as between the several plaintiffs there is no conflict of interest;

4. That heretofore, all motions in these causes have been jointly heard and depositions herein jointly made;

5. That defendant would not be prejudiced by the granting of this motion and justice will be promoted by joint trial and consolidation; and

6. That plaintiffs are represented by Roger E. Brooks and William G. Burgin, Jr., assisted by respective counsel from the Territory of Hawaii as shown in the records of these causes and each of the plaintiffs will save much expense by joint trial and consolidation.

This motion is based on the records of these causes and on the affidavit hereto attached.

Dated: November 14th, 1955.

PRATT, TAVARES & CASSIDY,
SHIRO KASHIWA,
WM. G. BURGIN, JR.,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brookes),
Attorneys for Plaintiffs.

Certificate.

I, Roger E. Brooks, of counsel for plaintiffs in the above-captioned cases do hereby certify that I have served the above and foregoing Motion on counsel of record for the defendant herein by mailing this date, United States air mail, postage prepaid, true copy thereof, to Earl T. Thomas, Esq., whose address is Lamar Life Building, Jackson, Mississippi.

Witness my hand, this the 14th day of November, 1955.

ROGER E. BROOKS,
(Roger E. Brooks).

Affidavit of Roger E. Brooks.

District of Columbia. ss.

Roger E. Brooks, being first duly sworn, on oath deposes and says:

1. That he is counsel of record in all three of the above-entitled causes; that he is fully familiar with the pleadings and depositions filed in all three causes; that he is fully familiar with the facts and evidence to be adduced to prove said facts in all three causes.

2. That all causes of action in each of three cases arise out of the processing of soybean meal by the Magnolia Soy Products Company of Greenville, Mississippi, upon advice and counsel of defendant corporation, using a chemical known as trichloroethylene manufactured and claimed to have been recommended by the defendant corporation; that all three cases have identically similar proof with relation to the

above; that upon shipment to Hawaii the plaintiffs suffered damage by reason of cattle deaths caused by the feeding of said Magnolia soybean meal; that an experimental feed test was conducted in the Territory of Hawaii of Magnolia feed above mentioned, the said feed test is common evidence in all three cases; that there will be presented other proof common to all three cases; that the law questions applicable to all three cases are substantially identical.

3. That the only difference in the three cases will be the question of damage suffered by the respective plaintiffs.

4. That by the joint trial and consolidation of all three cases, large costs will be saved by all plaintiffs.

5. That as between the three plaintiffs there is no conflict of interests; that defendant in all three cases is the same corporation.

6. That heretofore all motions in these three cases have been jointly heard; that all depositions taken in all three cases have been jointly taken and filed in these causes.

7. That all plaintiffs are represented, in addition to Roger E. Brooks and William G. Burgin, Jr., as shown by the records of these causes, by counsel from the Territory of Hawaii and it would save them considerable time and expense by a joint trial and consolidation.

8. That affiant believes that defendant would not be prejudiced by a joint trial and consolidation; that

there will be a savings of considerable expense and time by defendant to have a joint trial and consolidation in all three cases.

9. That an order of joint trial and consolidation would materially promote justice in all three cases without any prejudice to any plaintiff or the defendant.

ROGER E. BROOKS,
(Roger E. Brooks).

Subscribed and sworn to before me this 14th day of November, 1955.

ELIZA W. MERRILL,
(Seal) Notary Public, D. C.

My Commission Expires November 30, 1958.

ORDER FOR JOINT TRIAL AND CONSOLIDATION.

Filed this 22 day of Nov. 1955.

In the United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,

v. Civil Action No. 145.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Fred L. Waldron, Limited, Plaintiff,

v. Civil Action No. 143.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Upon the Motion of the plaintiffs in Civil Actions Nos. 142, 143 and 145 in this Court, all as above entitled, it appearing and this Court finding:

1. That in all three of said actions there are common questions of law and fact;

2. That by joint trial and consolidation unnecessary costs and delay would be avoided;

3. That as between the several plaintiffs there is no conflict of interest;

4. That heretofore all motions in all of said causes have been jointly heard and depositions have been jointly taken and filed;

5. That the same corporation is defendant in all of said actions;

6. That defendant would not be prejudiced by the granting of said motion and justice would be promoted by joint trial and consolidation; and

7. That plaintiffs are all represented by common counsel, namely, Roger E. Brooks and William G. Burgin, Jr., who are assisted by respective counsel from the Territory of Hawaii as shown in the records of said causes, and each of the plaintiffs will save much expense by joint trial and consolidation.

Now, Therefore, It Is Ordered:

That all of said three actions are hereby consolidated for trial of all issues of law and fact, and for all other purposes, except that under proper instructions of the Court the jury shall be authorized to bring in a separate verdict or separate verdicts in each action as the Court may hereafter find to be advisable and proper. This Nov. 22, '55.

ALLEN COX,
District Judge.

Consent:
WELLS, THOMAS & WELLS and
CARL E. GUENTHER,
By EARL T. THOMAS,
CARL E. GEUTHER,
Attorneys for Defendant.

C.V.O.B. No. 1, Page 288

Filed this 3 day of June 1954.

In the United States District Court for the Northern District of Mississippi.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Counsel for plaintiff and defendant in the above-captioned cause hereby stipulate that the depositions of Lawrence W. Campos, Francis C. Ching, Thomas B. Cockett, Dr. Robert Cross, Desmond Fletcher, Dr. G. C. Folger, William R. Ford, Robert Gould, Max F. Landgraf, Louis V. Luck, Frank Olim, Dr. William F. Parker, Stanley H. N. Waldron, Dr. E. H. Willers and W. Y. Young to be taken on June 17, 1954, at Honolulu, Territory of Hawaii, by C. Nils Tavares, Esquire, in the matter of Fred L. Wadron, Limited, v. E. I. du Pont de Nemours & Company, a corporation, who will note his appearance as counsel for

the plaintiff, may be used by plaintiff in this cause in the same manner and to the same extent said depositions could be used if taken by the plaintiffs, George T. Nishida and James E. Nishida, subject to the procedures established by the Federal Rules of Civil Procedure.

SHIRO KASHIWA,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiffs.
WELLS, THOMAS & WELLS,
CARL E. GEUTHER,
WALTER D. FORD,
By CARL E. GEUTHER,
Attorneys for Defendant.

WM. G. BURGIN, JR.,
(Wm. G. Burgin, Jr.).

STIPULATION.

Filed this 21 day of July 1955.

In the United States District Court for the Northern District of Mississippi.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Counsel for plaintiffs and defendant in the above-entitled cause hereby stipulate and agree as follows:

That the plaintiffs subject to, and only to, such objections as would be available to the defendant to the originals, may tender in evidence at the trial of this cause copies of original documents received by the defendant from Magnolia Soy Products Company, L. L. Ford, L. L. Ford Associates, Lyman Reed, Allen Jackson, O. H. Sale, James M. Warren and Davidson-Kennedy Company, set out and described in the Answer and Additional and Supplemental Answers of defendant in reply to Interrogatories of the plaintiffs of record in this cause, said copies to be of the same force and effect for all purposes as the original documents would be, if offered and admitted in evidence.

Dated this 27th day of June, 1955.

SHIRO KASHIWA,
PRATT, TAVARES & CASSIDY,
WM. G. BURGIN, JR.,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiffs.
WELLS, THOMAS & WELLS,
CARL E. GEUTHER,
WALTER D. FORD,
By EARL T. THOMAS,
Attorneys for Defendant.

We, the jury, find for the Defendant.

Nov. 29, 1955.

In the United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Re No. 11 of Designation:

For Direction for Entry of Judgment—See "Judgment", No. 15 of Designation.

MOTION FOR NEW TRIAL.

Filed this 10 day of Dec. 1955.

In the United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

vs. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Now come the plaintiffs in the above entitled consolidated actions and move this Honorable Court for a new trial upon the following grounds:

1. The verdict of the jury is contrary to the overwhelming weight of evidence.

2. The verdict of the jury is contrary to law.

3. The Court erred in failing to grant each and all of the instructions requested by the plaintiffs, covering the applicable law, except a portion of one instruction, and thereby failed to make clear to the jury the exact issues involved and the reasons therefor, to such extent that it is obvious that the jury misunderstood the few instructions given by the Court.

4. The Court erred in failing to instruct the jury, as requested by the plaintiffs, that the care of a prudent man varies according to circumstances dependent upon the degree of danger; that what is the pre-

cise legal intent of the term must depend, in the nature of things, upon the circumstances of each individual case; that it is a relative and not an absolute term; and that the degree of care and foresight which is necessary in any given case must always be in proportion to the nature and magnitude of the injuries and damages which might result from the occurrence which is to be anticipated and guarded against. The substance of said requested instruction is set forth in plaintiffs' requested instruction No. 2.

5. The Court erred in failing to instruct the jury, as requested by the plaintiffs, that under the Federal Food, Drug and Cosmetic Act, the causing of the introduction into interstate commerce of soy bean oil meal which is known to be intended for cattle feed and which is unfit for cattle feed is prohibited; that said Act further prohibits the shipment in interstate commerce of tri solvent which the sender knows may become a component part of feed that is unfit for cattle and is intended to be sold for cattle feed; and that said Act further prohibits the shipment of trichloroethylene solvent in interstate commerce unless the container thereof bears a label specifically informing prospective users as to its safe use; that if the jury should find by a preponderance of the evidence that the defendant in shipping tri solvent in interstate commerce to Magnolia Soy Products Company violated said Act, such violation would constitute negligence as a matter of law, and that unless the jury should further find that the defendant was exonerated by an intervening cause, the verdict should be for the plaintiffs; all as requested by plaintiffs' requested instructions Nos. 3, 4, and 5. Such instructions would have made the jury aware of the rele-

vancy and materiality of actions of defendant violative of the said Federal Act, as circumstances to be taken into consideration in considering the question of possible intervening cause, as well as establishing proximate cause between defendant's actions in connection with the construction of the Magnolia mill and the final damage to plaintiffs.

6. The Court erred in failing to instruct the jury as to the relevancy and applicability and materiality of the Hawaii Food, Drug and Cosmetic Act, as requested by plaintiffs' requested instruction No. 6. Such instructions would have made the jury aware of the relevancy and materiality of actions of defendant violative of the said Act, as circumstances to be taken into consideration in considering the question of possible intervening cause, as well as establishing the proximate cause between defendant's actions in connection with the construction of the Magnolia Mill and the final damage to plaintiffs.

7. The Court erred in failing to instruct the jury as requested by plaintiffs' requested instruction No. 7, as to the meaning of the term proximate cause, thereby tending to permit the jury to be confused in its consideration of the other instructions given by the Court which failed to show the jury the relationship of the various items of evidence to each other and to the ultimate issues, and caused them to misunderstand and misconstrue the instructions given, in relation to the letter of July 31, 1951, All Plaintiffs Exh. No. 35.

8. The Court erred in failing to instruct the jury as requested by plaintiffs' requested instruction No.

7(a), that, under the circumstances outlined in said requested instruction No. 7(a), acts of Magnolia subsequent to the acts of defendant mentioned in said requested instruction, would not constitute a sufficient intervening cause to discharge defendant from liability for its negligence if, among other things, listed in said instruction, Magnolia Soy Products Company's acts which caused the injuries to the plaintiffs were a normal response to a situation created by du Pont's conduct and the manner in which Magnolia acted was not highly extraordinary under the circumstances.

9. The Court erred in failing to include in its charge to the jury, which included a portion of plaintiffs' requested instruction No. 7(a), the remainder of said requested instruction setting forth the applicable law to the effect that an intervening act of a third person, negligent in itself, is not a superseding cause of injury to another which the actor's negligent conduct is a substantial factor in bringing about, under certain circumstances set forth in said omitted portion, which would have given greater understandability to the jury of a proposition of law applicable to the facts of this case that was and is extremely difficult to understand.

10. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instruction No. 8, that if under the circumstances outlined in said requested instruction, the jury should find that a reasonable person in the situation of defendant would or should have realized that there was a realizable likelihood that the Magnolia Soy Products Company would act in a particular manner, and that this was a hazard which made the defendant negligent in its

act or acts, then intervening acts of said Company, whether innocent, negligent, tortious or criminal, would not prevent the defendant from being liable to plaintiffs.

11. The Court erred in failing to instruct the jury as requested by plaintiffs' requested instruction No. 9, as to the meaning of an intervening cause as a new and independent cause, and that, unless the intervening cause is both new and independent, sufficient of itself to stand as the cause of the injury, breaking the casual connection, the original wrongdoer is not relieved from the legal responsibility for his wrong or negligence.

12. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instruction No. 10, as to the extent of the duty on the part of a manufacturer who manufactures an article, with actual or imputable knowledge that it will be put to a certain use that will create unusual hazards, to give adequate warning, not only to immediate purchasers of the product, but also to classes of persons in the situation of plaintiffs, and the effect of failure to adequately so warn them.

13. The Court erred in failing to instruct the jury specifically with respect to the letter of July 31, 1951, as requested by Plaintiffs' requested instruction No. 11, as to the matters to be considered by the jury in determining whether or not the letter of July 31, 1951, was adequate notice to the Magnolia Soy Products Company so as to prevent the defendant from being liable to plaintiffs for any negligent acts; the effect of failure to so instruct the jury left them

without any guide, or any adequate guide, to assist them in understanding the more general charge given by the Court, which related to a subject and a proposition of law extremely difficult to understand, namely the subject of intervening cause.

14. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instructions Nos. 12 and 13, and each of them, as to what an implied warranty as to fitness for an intended purpose of use is, and as to what an implied warranty as to merchantability is, and as to the meaning and effect of said respective implied warranties with respect to the issues of this case, all of which left the jury in a confused state of mind as to the meaning and import of the various counts of plaintiffs' actions, and the relation of said implied warranties to the overall picture given by the evidence.

15. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instruction No. 14, that if concurrent or successive negligence of two persons combined results in injury to a third person, he may recover of either or both.

16. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instruction No. 16, that, among other things, plaintiffs were entitled to prospective profits, as damages, and in instructing the jury that the plaintiffs were not entitled to any such profits at all.

17. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instruction No. 17, generally as to the purport of each count of plain-

tiffs' complaints, and in failing to permit the jury to pass upon each count separately, excluding, however Count Three, which was withdrawn.

18. The Court erred in admitting certain evidence, as shown by the reporter's notes in this case, over the objection of plaintiffs.

19. The effect of said errors in failing to instruct the jury or in instructing the jury as the Court did, as hereinabove specified, and as set forth in the Court's instructions actually given, was to leave the jury in a state of confusion and lack of understanding of and as to: (a) the various issues of fact involved; (b) the principles of law applicable thereto; (c) the interrelationship between various phases or portions of the evidence and other portions of such evidence; (d) the meaning of the term negligence and the effect of the Food, Drug and Cosmetic Act of the Federal Government and of the Territory of Hawaii, and each of them, upon the question of negligence, actual, imputed, implied, or per se; (e) and various other aspects hereinbefore set forth in this motion.

(20) The Court erred in failing to instruct the jury that in determining whether the letter of July 31, 1951, was a sufficient and intervening act to break the casual connection between the negligence of the defendant and plaintiffs' injuries and damage, said jury should take into consideration the acts and statements, if any, made by defendant's agent at the time said letter was delivered, together with all of the prior and subsequent dealings between Magnolia and the defendant, du Pont.

KASHIWA & KASHIWA,
ROGER E. BROOKS,
WM. G. BURGIN, JR.,
Attorneys for Plaintiffs,
By WM. G. BURGIN, JR.,
(Wm. G. Burgin, Jr.).

516 2nd Avenue North,
Columbus, Mississippi.

Certificate.

I, Wm. G. Burgin, Jr., of counsel for George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, do hereby certify that I have served a copy of the foregoing motion for a new trial on counsel for defendant, E. I. du Pont de Nemours & Company, by mailing this date, United States Air Mail, postage prepaid, two copies thereof, respectively, to Carl E. Geuther, 709i du Pont Building, Wilmington, Delaware, and Mr. Earl T. Thomas, Wells, Thomas & Wells, 900 Lamar Life Building, Jackson, Mississippi.

Witness my hand this the 8th day of December, A. D. 1955.

WM. G. BURGIN, JR.,
(Wm. G. Burgin, Jr.).

ORDER.

United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, d/b/a Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

vs. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, Defendant.

This day this cause coming on to be heard on the Motion for a New Trial as filed by the Plaintiffs herein, and the Court having read and considered said Motion and heard and received arguments of counsel for the Plaintiffs and Defendant thereon, and being of the opinion that neither said Motion nor the grounds thereof are well taken and that said Motion should be denied, and premises considered;

It Is Therefore Ordered and Adjudged that the Motion for a New Trial, as filed by Plaintiffs herein, George T. Nishida and James E. Nishida, d/b/a Hilo Dairy Company of Kauai, a co-partnership, be, and the same is, hereby denied.

Ordered and Adjudged this 2nd day of February, A. D. 1956.

/ALLEN COX,
United States District Judge

C.O.B. 1, Page 304.

JUDGMENT.

In the United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a corporation, Defendant.

This cause came on for trial before the Court and a jury, beginning on November 22, 1955, and continuing to and on November 29, 1955 (the intervening Thanksgiving and Sunday excepted), and the issues having been duly tried, and the jury on November 29, 1955, having rendered a verdict for the Defendant, it is hereby

O ered and Adjudged, that Plaintiffs take nothing by eir action, that the Defendant, E. I. du Pont de :mours & Company, have judgment on the verdic against the Plaintiffs, George T. Nishida and Jar s E. Nishida, doing business as Hilo Dairy Compa of Kauai, a co-partnership, and that said Defen nt have and recover from said Plaintiffs its co in the action.

I ed Dec. 2, 1955.

I the Court:

HERBERT D. STEPHENS, JR., Clerk.

To The Clerk:
Form of Judgment Approved:

Enter:
ALLEN COX,
United States District Judge.

Civil Order Book No. 1, Page 294.

NOTICE OF APPEAL.

In the United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Plaintiffs, George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a Corporation, herein and hereby appeal to the United States Court of Appeals for the Fifth Circuit from the judgment entered in the above-entitled cause on February 2, 1956, denying plaintiffs' motion for a new trial.

SHIRO KASHIWA,
WILLIAM G. BURGIN, JR.,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiffs.

Filed this 1 day of March 1956.

Motion of Plaintiffs to Extend Time for Filing Record on Appeal in Appellate Court;

Order entered 4/10/56 Extending time to File Record on Appeal in Appellate Court;

Omitted from the Printed Record, Pursuant to Designations of Counsel as to Printing Record copied at pages 1 et seq.

* * * * * * * *

APPELLANTS' DESIGNATION OF RECORD ON APPEAL.

Filed this 21 day of May 1956.

In the United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs.

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,

v. Civil Action No. 145.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Fred L. Waldron, Limited, Plaintiff,

v. Civil Action No. 143

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the plaintiffs-appellants hereby desig-

nate for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by notices of appeal filed March 1, 1956, the following portion of the records, proceedings and evidence in the three above-captioned actions:

1. Complaints filed December 9, 1953 in each of the above-captioned causes.

2. Answers to complaints filed January 14, 1954 in each of the above-captioned causes.

3. Motion of defendants for summary judgment.

4. Order denying motion for summary judgment.

5. Motion to consolidate the three actions.

6. Order granting motion to consolidate.

7. Stipulations entered of record.

8. Written instructions filed by plaintiffs.

9. Ruling of the Court denying request for allowance of plaintiffs' written instructions.

10. Exception to ruling of the Court denying plaintiffs' request for allowance of written instructions.

11. Verdict, together with the direction for the entry of judgment thereon.

12. Opinion.

13. Plaintiffs' motion for new trial.

14. Order entered February 2, 1956, denying plaintiffs' motion for new trial.

15. Judgment.

16. Notices of appeal filed.

17. Typewritten transcript of the opening statement of the Court to the jury and charge of the Court to the jury and of the testimony taken at the trial of these causes of the following-named witnesses:

For the plaintiffs—L. L. Ford and Dr. Raymond T. Vaughn;

For the defendant—R. Stuart Armstrong, C. B. Shepherd, Frank McDonald and .....

18. Copy of this designation of record on appeal on behalf of plaintiffs-appellants, dated May 24, 1956.

19. Statement of points on which appellants rely.

20. Plaintiffs' Hawaiian depositions, together with all exhibits attached thereto, and all exhibits admitted in evidence on behalf of plaintiffs.

21. All exhibits offered in evidence by plaintiffs, the admission of which was refused.

PRATT, TAVARES & CASSIDY,
INGMAN & INGMAN,
SHIRO KASHIWA,
WILLIAM G. BURGIN, JR.,
ROGER E. BROOKS,
Attorneys for Plaintiffs-Appellants.

By WM. G. BURGIN, JR.,
(Wm. G. Burgin, Jr.).

516 Second Avenue North,
Columbus, Mississippi.

Certificate.

I, Wm. G. Burgin, Jr., of counsel for plaintiffs, hereby certify that I have this day mailed a true copy of the foregoing Designations, postage prepaid, to Honorable Earl T. Thomas, Attorney, Lamar Life Building, Jackson, Mississippi and to Honorable Carl E. Guether, Attorney, DuPont Building, Wilmington, Del. counsel for defendant.

This the 21st day of May, A. D. 1956.

WM. G. BURGIN, JR.,
(Wm. G. Burgin, Jr.).

STATEMENT OF POINTS RELIED UPON BY PLAINTIFFS.

Filed this 21 day of May 1956.

In the United States Court of Appeals for the Fifth Circuit.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Ryoju Sokei, doing business as Sokei Dairy, Fred L. Waldron, Limited, Appellants,

v. No. 142, 145, 143.

E. I. Du Pont de Nemours & Company, a Corporation, Appellee.

Appeal from the United States District Court for the Northern District of Mississippi, Greenville Division.

The points upon which the appellants intend to and do rely on this appeal are as follows:

1. The verdict of the jury is contrary to the overwhelming weight of evidence.

2. The verdict of the jury is contrary to law.

3. The Court erred in failing to grant each and all of the instructions requested by the plaintiff, covering the applicable law, except a portion of one instruction, and thereby failed to make clear to the jury the exact issues involved and the reasons therefor, to such extent that it is obvious that the jury misunderstood the few instructions given by the Court.

4. The Court erred in failing to instruct the jury, as requested by the plaintiff, that the care of a prudent man varies according to circumstances dependent upon the degree of danger; that what is the precise legal intent of the term must depend, in the nature of things, upon the circumstances of each individual case; that it is a relative and not an absolute term; and that the degree of care and foresight which is necessary in any given case must always be in proportion to the nature and magnitude of the injuries and damages which might result from the occurrence which is to be anticipated and guarded against. The substance of said requested instruction is set forth in plaintiff's requested instruction No. 2.

5. The Court erred in failing to instruct the jury, as requested by the plaintiff, that under the Federal Food, Drug and Cosmetic Act, the causing of the introduction into interstate commerce of soybean oil meal which is known to be intended for cattle feed and which is unfit for cattle feed is prohibited; that said Act further prohibits the shipment in interstate commerce of a chemical solvent which the seller-shipper knew or should have known would be used in the manufacture of and become a component part of unfit food for cattle and which would be sold for feed for cattle; and that said Act further prohibits the shipment of the chemical solvent trichloroethylene, hereinafter referred to as tri or tri-solvent, in interstate commerce unless the container thereof bears a label specifically informing prospective users as to its safe use; that if the jury should find by a preponderance of the evidence that the defendant in shipping tri-solvent in interstate commerce to Magnolia Soy Products Company violated said Act, such

violation would constitute negligence as a matter of law, and that unless the jury should further find that the defendant was exonerated by an intervening cause the verdict should be for the plaintiffs; all as requested by plaintiffs' requested instructions Nos. 3, 4 and 5. Such instructions would have made the jury aware of the relevancy and materiality of actions of defendant violative of the said Federal Act, as circumstances to be taken into consideration in considering the question of possible intervening cause, as well as establishing proximate cause between defendant's actions in connection with the construction of and the operation of the Magnolia Mill and the final damage to plaintiffs.

6. The Court erred in failing to instruct the jury as to the relevancy, and applicability and materiality of the Hawaii Food, Drug and Cosmetic Act, as requested by plaintiffs' requested instruction No. 6. Such instruction would have made the jury aware of the relevancy and materiality of actions of defendant violative of the said Act, and therefore negligence as a matter of law, as circumstances to be taken into consideration in considering the question of possible intervenining cause, as well as establishing the defendant's actions, in connection with the construction and operation of the Magnolia Mill, the sale of tri to Magnolia for the processing of soybeans for feed for cattle as the proximate cause of the final damage to plaintiffs.

7. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instruction No. 7, as to the meaning of the term proximate cause, thereby tending to permit the jury to be confused in

its consideration of the other instructions given by the Court which failed to show the jury the relationship of the various items of evidence to each other and to the ultimate issues, and caused them to misunderstand and misconstrue the instructions given, in relation to the letter of July 31, 1951. All Plaintiffs' Exh. No. 35.

8. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instruction No. 7(a) that, under the circumstances outlined in said requested instruction No. 7(a), acts of Magnolia subsequent to the acts of defendant mentioned in said requested instruction, would not constitute a sufficient intervening cause to discharge defendant from liability for its negligence if, among other things, listed in said instruction, Magnolia Soy Products Company's acts which caused the injuries to the plaintiffs were a normal response to a situation created by du Pont's conduct and the manner in which Magnolia acted was not highly extraordinary under the circumstances.

9. The Court erred in failing to include in its charge to the jury, which included a portion of plaintiffs' requested instruction No. 7(a), the remainder of said requested instruction setting forth the applicable law to the effect that an intervening act of a third person, negligent in itself, is not a superseding cause of injury to another which the actor's negligence conduct is a substantial factor in bringing about, under certain circumstances set forth in said omitted portion, which would have given greater understandability to the jury of a proposition of law applicable to the facts of this case that was and is extremely difficult to understand.

10. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instruction No. 8, that if under the circumstances outlined in said requested instruction, the jury should find that a reasonable person in the situation of defendant would or should have realized that there was a realizable likelihood that the Magnolia Soy Products Company would act in a particular manner, and that this was a hazard which made the defendant negligent in its act or acts, then intervening acts of said Company, whether innocent, negligent, tortious or criminal, would not prevent the defendant from being liable to plaintiffs.

11. The Court erred in failing to instruct the jury as requested by plaintiffs' requested instruction No. 9, as to the meaning of an intervening cause as a new and independent cause, and that, unless the intervening cause is both new and independent, sufficient of itself to stand as the cause of the injury, breaking the casual connection, the original wrongdoer is not relieved from the legal responsibility for his wrong or negligence.

12. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instruction No. 10, as to the extent of the duty on the part of a manufacturer who manufactures an article, with actual or imputable knowledge that it will be put to a certain use that will create unusual hazards, to give adequate warning, not only to immediate purchasers of the product, but also to classes of persons in the situation of plaintiffs, and the effect of failure to adequately so warn them.

13. The Court erred in failing to instruct the ury specifically with respect to the letter of July 31, 1951,

as requested by plaintiffs' requested instruction No. 11, as to the matters to be considered by the jury in determining whether or not the letter of July 31, 1951, was adequate notice to the Magnolia Soy Products Company so as to prevent the defendant from being liable to plaintiff for any negligent acts; the effect of failure to so instruct the jury left them without any guide, or any adequate guide, to assist them in understanding the more general charge given by the Court, which related to a subject and a proposition of law extremely difficult to understand, namely the subject of intervening cause.

14. The Court erred in failing to instruct the jury that in determining whether the letter of July 31, 1951, was a sufficient and intervening act to break the casual connection between the negligence of the defendant and plaintiffs' injuries and damage, said jury should take into consideration the acts and statements, if any, made by defendant's agent at the time said letter was delivered, together with all of the prior and subsequent dealings between Magnolia and the defendant du Pont.

15. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instructions Nos. 12 and 13, and each of them, as to what an implied warranty as to fitness for an intended purpose of use is, and as to what an implied warranty as to merchantability is, and as to the meaning and effect of said respective implied warranties with respect to the issues of this case, all of which left the jury in a confused state of mind as to the meaning and import of the various counts of plaintiffs' actions, and the relation of said implied warranties to the overall picture given by the evidence.

16. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instruction No. 14 that if concurrent or successive negligence of two persons combined results in injury to a third person, he may recover of either or both.

17. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instruction No. 16 that, among other things, plaintiffs were entitled to prospective profits, as damages, and in instructing the jury that the plaintiffs were not entitled to any such profits at all.

18. The Court erred in failing to instruct the jury, as requested by plaintiffs' requested instruction No. 17, generally as to the purport of each count of plaintiffs' complaints, and in failing to permit the jury to pass upon each count separately, excluding, however, Count Three, which was withdrawn by consent of parties.

19. The Court erred in admitting certain prejudicial evidence, as shown by the reporter's notes in this case, over the objection of plaintiffs.

20. The effect of said errors in failing to instruct the jury or in instructing the jury as the Court did, as hereinabove specified, and as set forth in the Court's instructions actually given, was to leave the jury in a state of confusion and lack of understanding of and as to: (a) the various issues of fact involved; (b) the principles of law applicable thereto; (c) the interrelationship between various phases or portions of the evidence and other portions of such evidence; (d) the meaning of the term negligence and the ef-

fect of the Food, Drug and Cosmetic Act of the Federal Government and of the Territory of Hawaii, and each of them, upon the question of negligence, actual, imputed, implied, or per se; (e) and various other aspects hereinbefore set forth.

21. For the reasons set forth in paragraphs numbered 1 to 20, both inclusive, hereof, the Court erred in denying plaintiffs' motion for a new trial.

PRATT, TAVARES & CASSIDY,
INGMAN & INGMAN,
SHIRO KASHIWA,
WILLIAM G. BURGIN, JR.,
ROGER E. BROOKS,
By WM. G. BURGIN, JR.,
Attorneys for Appellants.

Certificate.

I, Wm. G. Burgin, Jr., of counsel for plaintiffs, hereby certify that I have this day mailed a true copy of the foregoing Statement of Points relied on by Plaintiffs to Honorable Earl T. Thomas, Attorney, Lamar Life Building, Jackson, Mississippi and to Honorable Carl E. Guether, Attorney, Du Pont Building, Wilmington, Del., counsel for defendants.

This the 21st day of May, 1956.

WM. G. BURGIN, JR.,
(Wm. G. Burgin, Jr.).

Appellants' Designation of Contents of Record on Appeal; Omitted from the Printed Record, pursuant

to Designations of Counsel as to Printing Record, copied at pages 1 et seq.

* * * * * * * *

MOTION FOR TRANSMISSION OF CERTAIN ORIGINAL RECORDS TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AT NEW ORLEANS.

Filed May 21—'56.

Allen Cox, Judge.

In the United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,

v. Civil Action No. 145.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Fred L. Waldron, Limited, Plaintiff,

v. Civil Action No. 143.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Now come the plaintiffs in the above-entitled consolidated actions and move this Honorable Court, pur-

suant to Rule 75 (i), Federal Rules of Civil Procedure, for an order directing that the original depositions, together with the attached exhibits and all additional exhibits admitted in evidence as filed of record in this Court be transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit at New Orleans, for inspection and consideration by that Court in connection with the appeal transcript of the other proceedings had and further, directing that the printing, typing, mimeographing or duplicating by any process of the said depositions and exhibits be dispensed with and the original depositions and exhibits as filed be transmitted in lieu of any and all copies.

The grounds for this motion are that the printing, typing, mimeographing or duplicating by any process of the said records would place upon the plaintiffs an unnecessarily heavy financial burden.

PRATT, TAVARES & CASSIDY.
SHIRO KASHIWA,
INGMAN & INGMAN,
WILLIAM G. BURGIN, JR.,
ROGER E. BROOKS,
By WM. G. BURGIN, JR.,
Attorneys for Plaintiffs.

Certificate.

I, Roger E. Brooks, of counsel for appellants do hereby certify that I have this day mailed to Earl T. Thomas, Esquire, at his address, Lamar Life Building, Jackson, Mississippi, and to Carl E. Geuther, Esquire, at his office, Du Pont Building, Wilmington, Delaware, counsel for appellee, true copies of the

above and foregoing motion, this, the 19th day of May, 1956.

WM. G. BURGIN, JR.

ORDER TO SEND TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AT NEW ORLEANS ORIGINAL DEPOSITIONS AND EXHIBITS IN LIEU OF ALL COPIES.

In the United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,

v. Civil Action No. 145.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Fred L. Waldron, Limited, Plaintiff,

v. Civil Action No. 143.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

On motion of the plaintiffs-appellants, there being no objection by defendant-appellee, the Court being fully advised in the premises and finding that good

cause for the Order sought does exist, it is, pursuant to Rule 75(i), Federal Rules of Civil Procedure, ordered that the Clerk of this Court transmit the original depositions, together with the attached exhibits, and all additional exhibits admitted in evidence as filed of record in this Court, together with, and at the time of the forwarding of, the transcript of the other proceedings had on appeal in the captioned causes, to the Clerk of the United States Court of Appeals for the Fifth Circuit at New Orleans to be inspected and considered by that Court in connection with the transcript of the other proceedings, and that the printing, typing, mimeographing or duplicating of said depositions and exhibits be and the same is hereby dispensed with, as said original depositions and exhibits are transmitted to said Appellate Court in lieu of any and all copies; and

It Is Further Ordered that the Clerk of this Court bind or attach said depositions and exhibits in such manner as to the said Clerk may be deemed proper and expedient for the preservation of the sequence of said depositions and exhibits to permit easy reference thereto by said Appellate Court and that said Clerk of the Court transmit with said depositions and exhibits a certificate identifying them with reasonable definiteness, which certificate shall accompany said depositions and exhibits and appeal transcript at the time they are transmitted to the said United States Court of Appeals; and

It Is Further Ordered upon final determination of said causes that said original depositions and exhibits be returned to the Clerk of this Court to be by him kept on file in this Court.

Ordered this 21 day of May, 1956.

ALLEN COX,
United States District Judge.

No objection as to form:

.....
Attorneys for defendant-appellees.

C.O.B. 1, Pages 316-317.

COUNTER-DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL.

Filed this 28 day of May 1956.

United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a Co-Partnership, Plaintiffs,

v. Civil Action No. 142

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Please take notice that E. I. Du Pont de Nemours & Company, a corporation, Defendant-Appellee, hereby designates the following portions of the record and proceedings, in addition to those designated by Appellants, to be certified by the Clerk of the United States District Court aforesaid and to be filed with the Clerk of the United States Court of Appeals for

the Fifth Circuit as the Record on Appeal in this action:

1. Motion of Defendant for a Directed Verdict, as to the Complaint herein and any and all Counts thereof, made at the close of Plaintiffs' case, which written Motion was filed and made a part of the records herein on November 28, 1955, the motion to file said written Motion having been made and permission so thus to file granted by the Court as appears from Page 264 of the Typewritten Transcript herein;

2. Order of the Court overruling the last above-mentioned Motion for Directed Verdict, which Order appears on Page 268 of the Typewritten Transcript herein;

3. Motion of Defendant for a Directed Verdict on Counts One, Two and Three, known as the Contract Counts, made at the close of Plaintiffs' case, which written Motion was filed and made a part of the record in this cause on November 28, 1955, the motion to file said written Motion having been made and permission so thus to file granted by the Court as appears from Page 269 of the Typewritten Transcript herein;

4. Order of the Court overruling the last above-mentioned Motion for Directed Verdict, which Order appears on Page 271 of the Typewritten Transcript herein;

5. Motion of Defendant for a Directed Verdict, as to the Complaint herein and any and all Counts thereof, made at the close of all the evidence in this case,

which written Motion was filed and made a part of the record in this cause on November 29, 1955, the motion to file said written Motion having been made and permission so thus to file granted by the Court as appears from Page 438 of the Typewritten Transcript herein;

6. Order of the Court overruling the last above-mentioned Motion for Directed Verdict, which Order appears on Page 438 of the Typewritten Transcript herein;

7. Motion of the Defendant for a Directed Verdict as to Counts One, Two and Three, known as the Contract Counts, made at the close of all the evidence in this case, which written Motion was filed and made a part of the record in this cause on November 29, 1955, the motion to file said written Motion having been made and permission so thus to file granted by the Court as appears from Page 438 of the Typewritten Transcript herein;

8. Order of the Court overruling the last above-mentioned Motion for Directed Verdict, which Order appears on Page 439 of the Typewritten Transcript herein;

9. All Exhibits admitted in evidence in this cause on behalf of Defendant, these Exhibits being received in evidence and marked with the following Exhibit numbers, and a summary description of each Exhibit being set forth as follows.

Exhibit Number	Summary Description
D-1	List of cattle at Hilo Dairy.
D-2	Ledger account for cattle for Hilo Dairy.
D-3	Summary of cows purchased since July 1, 1946.
D-4	Letter of October 11, 1949, from Lyman Reed to F. G. Low of du Pont.
D-5	Photostatic copies of chemical safety data sheets and other printed matter.
D-6	Photostatic copy of underwriters laboratories card on cleaning liquid.
D-7	Photostatic copy of printed material on du Pont chlorinated hydrocarbons.
D-8	Letter from Magnolia Soy Products Company, by L. L. Ford, dated February 14, 1952, to Mr. C. B. Shepherd, du Pont.
D-9	Photostatic copy of an excerpt from "Feedstuffs", a weekly newspaper dated October 6, 1951.
D-10	Letter from C. B. Shepherd to Lyman Reed dated July 31, 1951.
D-11	Copy of original Order from Magnolia Soy Products Company to E. I. du Pont, the Order having been entered on October 2, 1951, and the invoice being dated November 21, 1951.
D-12	Factory shipping advice from du Pont to Magnolia Soy Products Company, shipping date shown as November 19, 1951.
D-13	An Acknowledgment of Order from du Pont to Magnolia Soy Products Company showing the Order entered October 2, 1951, front and reverse.
D-14 a	Copy of Uniform Straight Bill of Lading issued by Illinois Central Railroad Company showing car number IC-27892 was received for shipment in Greenville, Mississippi, on November 26, 1951

Exhibit Number	Summary Description
D-14 b	Copy of Memorandum of Bill of Lading issued by Illinois Central Railroad Company showing that car number IC-27831 was received for shipment in Greenville, Mississippi, on November 26, 1951.
D-14 c	Copy of Uniform Straight Bill of Lading issued by Illinois Central Railroad Company showing car number IC-32008 was received for shipment in Greenville, Mississippi, on the 23rd day of November, 1951.
D-15 a	Copy of Memorandum of Bill of Lading issued by Illinois Central Railroad Company showing that car number NYC-178296 was received for shipment on the 26th day of November, 1951.
D-15 b	Copy of Memorandum of Bill of Lading issued by Illinois Central Railroad Company showing that car number SOU-22061 was received for shipment from Greenville, Mississippi, on December 8, 1951.
D-15 c	Shipping Order of Illinois Central Railroad Company showing that car number NH-33672 was received for shipment from Greenville, Mississippi, on December 10, 1951.
D-16	Request of the Court to take judicial notice of the law of the State of New York;

10. All colloquies between Counsel, and between Court and Counsel, as appear from Page 439 to Page 463, both inclusive of the Typewritten Transcript; and

11. This Counter-Designation.

EARL T. THOMAS,
(Earl T. Thomas).

Office and Post Office Address:
9 Lamar Life Building,
Jackson, Mississippi.

CARL E. GEUTHER,
Attorneys for Appellee-Defendant.

Office and Post Office Address:
798 Du Pont Building,
Wilmington, Delaware.

WELLS, THOMAS & WELLS,
9 Lamar Life Building,
Jackson, Mississippi.
Of Counsel.

Affidavit of Service.

State of Mississippi,
County of Hinds.

Earl T. Thomas, being by me first duly sworn, makes oath that he has served the above and foregoing Counter-Designation of Additional Portions of Record on Appeal on Counsel for the Plaintiffs by mailing this date, first class air mail, postage prepaid, true copies thereof respectively, to the follow-

ing Attorneys of Record for the Plaintiffs, at the following respective addresses thereof:

William G. Burgin, Jr., Esq.
516 North Second Avenue
Columbus, Mississippi
Roger E. Brooks, Esq.
923—20th Street, N. W.
Washington 6, D. C.
Nils Tavares, Esq.
Messrs. Pratt, Tavares & Cassidy
Alexander & Baldwin Building
Honolulu, Hawaii
Shiro Kashiwa, Esq.
Messrs. Kashiwa & Kashiwa
Hawaiian Trust Building
Honolulu, Hawaii
David Ingman, Esq.
Alexander Young Building
Honolulu, Hawaii;

their usual and respective post office addresses.

EARL T. THOMAS,
(Earl T. Thomas).

Sworn to and subscribed before me, this the 28th day of May, 1956.

JEWELL BEARD,
(Seal) Notary Public.

My Commission Expires November 10, 1959.

ORDER TO SEND TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AT NEW ORLEANS ORIGINAL DEPOSITIONS AND EXHIBITS AND COURT FILES IN LIEU OF ALL COPIES.

In the United States District Court for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Kyoju Sokei, doing business as Sokei Dairy, Plaintiff,

v. Civil Action No. 145.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Fred L. Waldron, Limited, Plaintiff,

v. Civil Action No. 143.

E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

On motion of the plaintiffs-appellants, there being objection by defendant-appellee, the Court being fully advised in the premises and finding that good cause for the Order sought does exist, it is, pursuant to Rule 75(i), Federal Rules and Civil Procedure, ordered that the Clerk of this Court transmit the original complaints, answers to complaints, motion of defendants for summary judgment, order denying motion for summary judgment, motion to consolidate

the three causes of action, order granting motion to consolidate, stipulations entered of record, written instructions filed by plaintiffs, plaintiffs' motion for new trial, order denying plaintiffs' motion for new trial, judgment, notices of appeal filed, motion to extend time to file and docket appeal, together with order thereon, designation of record on appeal, statement of points on which appellants rely, plaintiffs' original Hawaiian depositions, together with the attached exhibits, and all additional exhibits admitted in evidence as filed of record in this Court, together with, and at the time of the forwarding of, the transcript of the other proceedings had on appeal in the captioned causes, to the Clerk of the United States Court of Appeals for the Fifth Circuit at New Orleans to be inspected and considered by that Court in connection with the transcript of the other proceedings, and that the printing, typing, mimeographing or duplicating of said depositions and exhibits be and the same is hereby dispensed with, as said original depositions and exhibits are transmitted to said Appellate Court in lieu of any and all copies; and

It Is Further Ordered that the Clerk of this Court bind or attach said original Court records, depositions and exhibits in such manner as to the said Clerk may be deemed proper and expedient for the preservation of the sequence of said depositions and exhibits to permit easy reference thereto by said Appellate Court and that said Clerk of the Court transmit with said depositions and exhibits a certificate identifying them with reasonable definiteness, which certificate shall accompany said depositions and exhibits and appeal transcript at the time they are transmitted to the said United States Court of Appeals; and

It Is Further Ordered upon final determination of said causes that said original Court records, depositions and exhibits be returned to the Clerk of this Court to be by him kept on file in this Court.

Ordered this 29 day of May, 1956.

ALLEN COX,
United States District Judge.

C.O.B. 1, Pages 318-319.

COMPLAINT.

Filed this 9 day of Dec. 1953.

In the United States District Court for the Northern District of Mississippi.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,
vs. Civil Action No. 145.
E. I. Du Pont de Nemours & Company, a corporation,
Defendant.

Count One.

1. The plaintiff is and at all times mentioned in this complaint was a resident of Kapaa District of the County of Kauai, Island of Kauai, Territory of Hawaii, and for many years prior to the date hereof, the plaintiff was and is now engaged in a dairy business within the Territory of Hawaii under the name and style of "Sokei Dairy".

2. The defendant is a corporation organized and existing under the laws of the State of Delaware, with its domicile and principal office in Wilmington, Delaware, and having qualified to do business and doing business in the State of Mississippi, and having appointed an agent for the service of process for suits in said State, to wit: R. H. Thompson, in Jackson, Hinds County, Mississippi, upon whom service of process may be had.

3. The matter in controversy exceeds the sum or value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

4. The jurisdiction of the Court is invoked under Section 1332, Title 28, U. S. Code, June 25, 1948, c. 646, 62 Stat. 930; and under the Federal Food, Drug and Cosmetic Act, Chapter 9, Title 21, U. S. Code, June 25, 1938, c 675, 52 Stat. 1040.

5. During the year 1951 and continuously for many years prior thereto the plaintiff has been and is now engaged in the aforesaid dairy business in the County of Kauai, Territory of Hawaii; the said business consisting of raising, feeding and maintaining cows for the purpose of milking said cows and selling the milk obtained throughout the County of Kauai.

6. On or about the end of 1951, up to the time of the occurrence of the incidents hereinafter more particularly described, the plaintiff owned and was using in the said dairy business about one hundred and thirty-five head of good dairy cows and in addition owned thirty male calves and twenty-one female calves; the latter calves plaintiff was raising for use

as dairy cows; the said business was a prosperous and profitable one with excellent good will and a large number of customers throughout the said County of Kauai; and all of said cattle and the dairy business were at all times mentioned owned by the plaintiff.

7. In December, 1951, January, 1952 and February, 1952, plaintiff for a fixed consideration ordered for purchase from Fred L. Waldron, Limited a corporation, incorporated under the laws of the Territory of Hawaii, with its principal office at all times herein mentioned at 808 Fort Street, Honolulu, City and County of Honolulu, Territory of Hawaii, a total of 380 sacks of soybean meal weighing 100 pounds per sack; of the 380 sacks 120 sacks were ordered in December, 1951, 100 sacks were ordered in January, 1952, and 160 sacks were ordered in February, 1952; the said Waldron, Limited, on receipt of each order of purchase agreed to accept it and in accordance with said agreements did sell and deliver to plaintiff the 380 sacks of soybean meal weighing 100 pounds per sack and the said meal was accepted by plaintiff.

8. For many years prior and to the date of this complaint, the said Waldron, Limited, was extensively engaged in the business of buying and selling feeds of all kinds for cattle and during the said period in the course of its business sold a considerable amount of various cattle feed in the County of Kauai.

9. The plaintiff for years prior and continuously during the year 1951 and including the time of the occurrence of the transactions herein alleged, purchased from the said Waldron, Limited, cattle feed

including soybean meal and in all of said purchases the plaintiff relied exclusively on the skill and judgment of the said seller in selecting cattle feed, including soybean meal of good quality and fit for consumption by plaintiff's cattle and the said Waldron, Limited, in all of the purchases aforementioned and during the stated period of time well knew all of the facts alleged in paragraph 5 of Count One hereof and that any soybean meal purchased by plaintiff was for the purpose of feeding it to plaintiff's aforesaid dairy herd.

10. Upon delivery of the 380 sacks of soybean meal as aforesaid, plaintiff fed the said meal to all the cattle aforementioned in paragraph 6 hereof, except those dairy cows which were not at that time producing milk, and as a result of the consumption of the said meal by the aforesaid cattle out of plaintiff's herd of about 188 head, 52 milking cows and 51 calves died and the remainder of the herd, with the exception of those dairy cows not fed the meal contained in the aforesaid 380 sacks, became violently ill; the meal in said sacks contained poisonous and toxic matter which directly and proximately caused the aforesaid deaths and violent illnesses of the cattle of the plaintiff and required plaintiff to employ labor in disposing of the dead cattle and to employ veterinarians and additional labor to care for the said herd, and as a direct result of the deaths of the dairy cows and calves and the violent illness of the remainder of plaintiff's herd of cattle, with the exception of those dairy cows not fed said meal as aforesaid, plaintiff has not been and will not be able to supply milk to many of his customers, has lost thereby a large number of customers and the good will of

his business with the consequent loss ot profits and he will continue to suffer great loss of profits.

11. The said Waldron, Limited, for a fixed consideration placed an order to purchase two hundred (200) tons of solvent soybean meal sacked in burlap bags with The Brode Corporation of Memphis, Tennessee, and the purchase order was accepted by confirmation of sale of the said corporation dated October 30, 1951.

12. The said Brode Corporation for a fixed consideration placed an order of purchase for the meal described in paragraph numbered 11 hereof with the Magnolia Soy Products Company of Greenville, Mississippi, and the said Company accepted the order and as part thereof, did ship through interstate commerce to the said Waldron, Limited at Port Allen, in the Territory of Hawaii, the said 380 sacks of soybean meal, extracted with trichloroethylene, sold and delivered by Waldron, Limited, as herein alleged to the plaintiff with the resulting loss to the dairy herd of the plaintiff aforementioned.

13. The said soybean meal, extracted with trichloroethylene, as manufactured by the said Magnolia Soy Products Company, was placed in the aforesaid 380 sacks by the said company at its plant in Mississippi and it was received by the said Waldron at the designated port of Port Allen in the Territory of Hawaii, in the original sacks of the aforesaid, each sack having attached when received, the said Company's identification tag, and the said 380 sacks of meal, each with said Company's identification tag attached, were delivered as aforesaid by Waldron to

the plaintiff, each sack having been unopened from the time it was placed in shipment by the said Company until received by the plaintiff and by him opened for the feeding of the contents to his aforesaid dairy herd.

14. The defendant was engaged, among other activities, in the manufacture, for sale and distribution through interstate commerce, of certain chemical compounds and sold and shipped through interstate commerce, to Magnolia Soy Products Company a chemical solvent, to wit: trichloroethylene, for use in extracting soybean oil from soybeans, then and there well knowing that the soybean meal, from which the soybeans oil was to be extracted by use of its product trichloroethylene was to be sold for cattle feed; the defendant at the time of making the sale of the aforesaid chemical solvent to Magnolia Soy Products Company then and there knew, or by the exercise of ordinary care could have known, that soybean meal which had the soybean oil extracted therefrom by the use of the said chemical solvent became unfit for and dangerous as food for cattle, and knew or by the exercise of ordinary care could have known that said solvent, if used for the purpose for which the defendant recommended, sold and delivered it to the Magnolia Soy Products Company for use by the company in the manner which defendant knew it would be used, would cause the soybean meal to become poisonous to and unfit as food for cattle.

15. The defendant well knew, or should have known, that soybean meal when processed with its manufactured product trichloroethylene for sale and

delivery through interstate commerce for feed for cattle was toxic and poisonous and would when fed to cattle, including the cattle of the plaintiff, result in great and serious damage and the defendant through the sale and delivery of the said solvent for the aforesaid purpose then and there breached its implied warranty that soybean meal so manufactured would be fit and wholesome food for consumption by plaintiff's said dairy herd; the implied warranty was a material part and condition of the sale transaction and plaintiff relied on said warranty.

16. By reason of said breach of implied warranty, plaintiff has suffered great damage; the damages hereinafter claimed and alleged are damages for losses directly and proximately and naturally resulting in the ordinary course of events from the breach of warranty aforealleged by the defendant; at the time of the sale and delivery aforealleged the defendant well knew, or should have known, that all of the losses hereinafter set forth would directly and proximately result from the said sale and delivery of poisonous and toxic soybean meal; the poisonous and toxic condition of the said meal resulted directly from the use in its processing and manufacturing of trichloroethylene manufactured, sold and delivered by the defendant to the Magnolia Soy Products Company; all losses for which damages are hereinafter claimed were all reasonably foreseeable.

17. Plaintiff suffered the following specific and special damages: From the deaths of 51 head of good, high quality calves, $14,400.00; from the deaths of 52 head of good, high quality milking cows, $41,600.00; from the violent illnesses of the remainder of the

plaintiff's herd of good, high quality milking cows, fed the aforesaid soybean meal, which said cows are now as a result of said illness, neither marketable nor are they good milk producers, $30,000.00; from, as alleged herein, the inability of the plaintiff to supply milk because of the reduction of the dairy herd through the aforesaid deaths and violent illness of the milking cows, resulting in loss of a large number of customers and the good will of the business, $30,000.00; from the purchase at great cost and expense of a large amount of milk from suppliers in Honolulu, Hawaii, to permit plaintiff to continue to supply some of his regular customers, $10,000.00; by reason of required services of veterinarians, $433.50; and by reason of the employment of labor primarily in disposing of dead cattle and secondarily in tending sick cattle, $2,560.40.

18. The plaintiff further claims as general damages the sum of $70,000.00. The total of plaintiff's damages, special and general, is $198,993.90.

19. Prior to the filing of this complaint the plaintiff requested and demanded of the defendant payment of damages as aforesaid but defendant has paid no part thereof and refuses to pay the said damages or any part thereof and there is now due and owing to the plaintiff from the defendant the total sum of $198,993.90 by reason of the breach of the aforesaid warranty.

Count Two.

1. Plaintiff reiterates and realleges all of the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of Count One hereof.

2. The defendant at the time of the aforementioned sale of and delivery of its manufactured product, the solvent trichloroethylene, to Magnolia Soy Products Company, knowing that the said Company would use the said solvent in extracting oil from soybeans and that the residual meal, including the aforesaid 380 sacks of meal sold and shipped in interstate commerce to the said Waldron, Limited, at Port Allen in the Territory of Hawaii, and by the said Waldron sold and delivered to the plaintiff for feed for his cattle, impliedly warranted to all purchasers including the plaintiff that the contents of the aforesaid 380 sacks of soybean meal were of merchantable quality; the implied warranty was a material part and condition of the sale transaction and plaintiff relied on said warranty, and the defendant well knew, or should have known, that the soybean meal manufactured through the use of the solvent trichloroethylene, for sale and delivery through interstate commerce to the general public and to Fred L. Waldron, Limited, for sale by the latter, within the said Territory for feed for cattle, including the cattle of plaintiff, was toxic and poisonous and would when fed to cattle result in great and serious damage and the defendant at the time of the aforesaid sale and delivery to the said Waldron then and there breached its implied warranty of the merchantable quality of the said soybean meal to the great damage to the plaintiff.

3. The damages set out and claimed in paragraphs 17 and 18 of Count One hereof are damages for losses directly and proximately and naturally resulting in the ordinary course of events from the breach by defendant of the aforesaid warranty of merchantable

quality, and were all reasonably foreseeable by the defendant.

4. Plaintiff reiterates and realleges all of the allegations in paragraphs 17, 18 and 19 of Count One hereof and demands payment of the damages set out in said paragraphs 17 and 18 by reason of the aforesaid breach of the defendant's implied warranty of merchantable quality.

Count Three.

1. Plaintiff reiterates and realleges all of the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of Count One hereof.

2. The defendant at the time of the aforementioned sale and at the time the said soybean meal was placed in the said 380 sacks by Magnolia Soy Products Company at its plant at Greenville, Mississippi, for shipment in interstate commerce to Waldron at Port Allen in the Territory of Hawaii, expressly warranted to all purchasers including the plaintiff that the contents of the aforementioned 380 sacks of soybean meal were of merchantable quality and fit for consumption by cattle and the express warranty was a material part and condition of the sale transaction and plaintiff relied on said warranty, and the defendant well knew, or should have known, that the soybean meal manufactured and processed through the use of its product the solvent trichlorothylene, for sale and delivery through interstate commerce to Fred L. Waldron, Limited, for sale within the Territory of Hawaii for feed for cattle, including the cattle of plaintiff, was toxic and poisonous and would

when fed to cattle result in great and serious damage and the defendant at the time of the aforesaid sale and delivery to the said Waldron then and there breached its express warranty of the merchantable quality and fitness for consumption by cattle of the said soybean meal to the great damage of the plaintiff.

3. The damages set out and claimed in paragraphs 17 and 18 of Count One hereof are damages for losses directly and proximately and naturally resulting in the ordinary course of events from the breach by defendant of the aforesaid express warranty of merchantable quality and fitness for consumption by cattle and were all reasonably foreseeable by the defendant.

4. Plaintiff reiterates and realleges all of the allegations in paragraphs 17, 18 and 19 of Count One hereof and demands payment of the damages set forth in said paragraphs 17 and 18 by reason of the aforesaid breach of the defendant's express warranty of merchantable quality and fitness for consumption.

Count Four.

1. Plaintiff reiterates an realleges all of the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of Count One hereof.

2. That at all times mentioned herein the laws of the Territory of Hawaii, as material herein, provided as follows:

"Chapter 41. Food. Drugs and Cosmetics.

Sec. 2201. Definitions. For the purposes of this part:

(d) 'Food' means (1) articles used for food or drink for man or animals. . .(3) articles used for components of any such article. . .

Sec. 2206, Prohibited acts. The following acts and the causing thereof within the Territory by any person are hereby prohibited: (a) The manufacture, sale, or delivery, holding or offering for sale of any good, drug, device, or cosmetic that is adulterated or misbranded. . . . (c) The receipt in commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise. . .

Sec. 2209, Foods deemed to be adulterated when. A food shall be deemed to be adulterated: (a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 2213; or (3) if it consists in whole or in part of a diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been produced, prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health; . . .

3. That at all times mentioned herein the laws of the United States, as material herein, provided as follows:

Federal Food, Drug and Cosmetic Act (Vol. 5, FCA, Title 21).

"Sec. 321. Definitions: generally

(f) The term 'food' means (1) articles used for food or drink for man or other animals. . . (3) articles used for components of any such article.

"Sec. 331. Prohibited acts

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise. . ."

That the definition of adulterated food is the same as that recited above with relation to the laws of the Territory of Hawaii.

4. On or about December 1, 1951, plaintiff for a fixed consideration ordered for purchase from Fred

L. Waldron, Limited, Honolulu, Hawaii, 380 sacks of soybean meal to be used for feed for his cattle in this complaint described, the said Waldron, Limited, ordered for a fixed consideration said meal from The Brode Corporation of Memphis, Tennessee, and the Brode Corporation for a fixed consideration ordered for purchase, as set forth and alleged in paragraphs 11 and 12 of Count One hereof, the said soybean meal from the Magnolia Soy Products Company, Greenville, Mississippi.

5. The said Magnolia Soy Products Company accepted the said order and manufactured, packed, sold, shipped in interstate commerce and delivered the said 380 sacks of meal of 100 pounds each, to the said Waldron, at said port of Port Allen, County of Kauai, Territory of Hawaii, for sale by the said Waldron to the plaintiff for feed for his cattle.

6. The defendant was engaged, among other activities in the manufacture, for sale and distribution through interstate commerce, of certain chemical compounds and sold and shipped through interstate commerce to Magnolia Soy Products Company a chemical solvent, to wit: trichloroethylene, for use in extracting soybean oil from soybeans, then and there well knowing that the soybean meal, from which the soybean oil was to be extracted by use of its product trichloroethylene was to be sold for cattle feed; the defendant at the time of making the sale of the aforesaid chemical solvent to Magnolia Soy Products Company then and there knew, or by the exercise of ordinary care could have known, that soybean meal which had the soybean oil extracted therefrom by the use of the said chemical solvent became unfit for and dangerous as food for cattle,

and knew or by the exercise of ordinary care could have known that said solvent, if used for the purpose for which the defendant recommended, sold and delivered it to the Magnolia Soy Products Company for use by the Company in the manner which defendant knew it would be used, would cause the soybean meal to become poisonous to and unfit as food for cattle; the defendant knew that the chemical solvent trichloroethylene had caused death and injury to cattle when used for the aforesaid purpose at numerous previous times and would in this instance.

7. The defendant, at the time of the sale of the chemical solvent and its delivery through interstate commerce to Magnolia Soy Products Company or at any time thereafter, failed and neglected to inform the said Company, the plaintiff or the general public that the aforesaid chemical solvent when used to extract soybean oil made the residual soybean meal poisonous and injurious to and unfit and unsound as food for cattle; the defendant owed a duty to do so and the failure to perform this duty constituted negligence.

8. The defendant recommended the use of and sold and distributed trichloroethylene through interstate commerce as a solvent to remove soybean oil from soybeans, knowing that the residual meal was to be used as cattle food, knowing, or the defendant should have known, at the time of the sale and delivery of the trichloroethylene to Magnolia Soy Products Company that the Company would process, manufacture, market and distribute, through interstate commerce, to the general public the residual meal for use as cattle food and the said Company did manufacture, sell and distribute to the general pub-

lic, including the plaintiff, soybean meal so processed with the aforesaid solvent, the defendant having knowledge of the dangerous qualities of the solvent trichloroethylene.

9. The defendant having knowledge or being chargeable with knowledge, of the use to be made by the Magnolia Soy Products Company of the defendant's product trichloroethylene, the sale and distribution through interstate commerce of the residual meal and the damage to cattle of the meal when so processed as food for cattle, a duty arose on the part of the defendant to perform and carry out such test as would make certain that the aforesaid soybean meal would not be unfit, unsound and injurious to cattle when fed to them. This duty the defendant failed to perform, thus the defendant is guilty of negligence.

10. The aforesaid negligence of the defendant up to the time of the injury to the plaintiff directly and proximately caused the death and destruction of the plaintiff's dairy cattle, and all of the other injuries to plaintiff as herein specifically and generally set out.

11. The soybean meal, the contents of the said 380 sacks, was processed or manufactured through and by the use of the solvent, trichloroethylene, a product or chemical manufactured by and sold and delivered through interstate commerce by the defendant to the said Magnolia Soy Products Company, the said soybean meal so manufactured was highly toxic and poisonous and when fed after delivery as aforesaid, to plaintiff's herd of dairy cows caused 52 of the good quality milking cows, 30 male calves and 21 female calves, to die, and the remainder of the herd, with

the exception of those cows which were not at that time producing milk, and were not, therefore, fed the said meal, to become seriously ill.

12. The defendant, the manufacturer of the chemical trichloroethylene, knew or should have known that the trichloroethylene would be used for the stated purpose by the said Magnolia Soy Products Company, knew or should have known that the soybean meal resulting from the use of the said chemical would be sold and delivered through interstate commerce for feed for cattle, and knew or should have known that the residual meal so processed was toxic and poisonous and would when fed to cattle cause serious illness and death to the cattle; notwithstanding such knowledge or imputed knowledge, the defendant carelessly and negligently manufactured and delivered as aforesaid the said chemical; thereby and by reason thereof the death and illness of the cattle and all and every injury of the plaintiff as set forth in this complaint were directly and proximately caused by the sale and use of the said trichloroethylene in the processing of soybeans, resulting in the said poisonous and toxic meal.

13. There was a duty on the part of the defendant under the conditions and circumstances aforealleged to use reasonable care not to ship and deliver through interstate commerce the said trichloroethylene for use in the manufacture of soybean meal for feed for cattle, including the aforesaid cattle of the plaintiff; the failure of the defendant to exercise due care constituted negligence.

14. Plaintiff reiterates and realleges all of the allegations contained in paragraphs 17, 18 and 19 of Count One hereof.

15. By reason of said negligence the plaintiff suffered great damage; the damages claimed are set out in paragraphs 17 and 18 of Count One hereof and are damages for losses directly and proximately and naturally resulting in the ordinary course of events from the negligence of the defendant as aforesaid, in that defendant well knew, or should have known, at the time of the said delivery of the aforesaid meal that it would be, from the use of the defendant's manufactured chemical trichloroethylene, poisonous and toxic and that all of the losses aforesaid would directly and proximately result, for all of the losses for which damages are claimed as aforealleged were reasonably foreseeable.

16. The transaction upon which this cause of action is based is the same transaction alleged in Counts One, Two and Three of this Complaint.

Wherefore, the plaintiff demands judgment against the defendant in the sum of One Hundred Ninety Eight Thousand Nine Hundred Ninety Three Dollars and Ninety Cents ($198,993.90).

WINSTON C. INGMAN and
DAVID N. INGMAN,

566 Alexander Young Building,
Honolulu, Hawaii.

ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiff.

923—20th St., N.W.,
Washington, D. C.

DEMAND FOR JURY TRIAL.

The plaintiff demands a trial by jury on all issues.

WINSTON C. INGMAN, and
DAVID N. INGMAN,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks).

ANSWER OF E. I. DU PONT DE NEMOURS & COMPANY, DEFENDANT.

Filed this 14 day of Jan. 1954.

United States District Court for the Northern District of Mississippi, Greenville Division.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,
v. Civil Action No. 145.
E. I. Du Pont de Nemours & Company, a corporation, Defendant.

Now comes E. I. Du Pont de Nemours & Company, (hereinafter, for the sake of brevity, sometimes referred to variously as "Defendant," "this Defendant" or "du Pont"), the Defendant in the above entitled and numbered action, and files this, its Answer to the Complaint herein.

Answer to Count One.

First Defense.

Count One of the Complaint fails to state a claim against this Defendant upon which relief can be granted.

Second Defense.

Now responding to, and following the same numbering of paragraphs of, Count One of the Complaint, Defendant answers and says:

1.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of Count One of the Complaint, and, therefore, the allegations of said paragraph of Count One are denied.

2 and 3.

Defendant admits the allegations contained in paragraphs 2 and 3 of said Count One of the Complaint.

4.

Defendant admits that Plaintiff claims and invokes jurisdiction of this Court under the code sections and Acts of Congress referred to in paragraph 4 of Count One of the Complaint, but Defendant denies that this Honorable Court has jurisdiction of either the subject matter or the parties.

5-13, inclusive.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5, 6, 7, 8, 9, 10, 11, 12 and 13 of Count One of the Complaint, and, therefore, each and every allegation contained

in all of said paragraphs in Count One of the Complaint are denied.

14.

Defendant denies each and every allegation of paragraph 14 of Count One of the Complaint, except Defendant admits that it was engaged, among other activities, in the manufacture, for sale and distribution through interstate commerce, of certain chemical compounds and sold and shipped through interstate commerce, to Magnolia Soy Products Company, a chemical solvent, to-wit: trichloroethylene, for use in extracting soybean oil from soybeans.

15 and 16.

Defendant denies each and every allegation contained in paragraphs 51 and 16 of Count One of the Complaint.

17 and 18.

For answer to paragraphs 17 and 18 of Count One of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs 17 and 18 of said Count One, as to the loss of high quality calves, loss of high quality milking cows, injury to other high quality milking cows, losses of milk profits, losses of good-will, expenses incurred in purchasing milk from outside sources to continue to supply regular purchasers, expenses incurred by the use of veterinarians, the employment of labor in disposing of dead cattle and

the tending of sick cattle, and further general damages, and, therefore, all allegations of Plaintiff in said paragraphs 17 and 18 are denied.

Defendant denies that any and all such alleged losses referred to in paragraphs 17 and 18 of Count One were the result of any negligence of the Defendant, or any act, or failure to act, or violation of any duty, by the Defendant.

19.

Defendant admits that Plaintiff has made demand upon it prior to the filing of this Complaint for payment of $198,993.90, and admits that Defendant has paid no part thereof and that Defendant has refused to pay said sum or any part thereof; but Defendant denies each and every other allegation contained in said paragraph 19 of Count One of the Complaint.

Answer to Count Two.

First Defense.

Count Two fails to state a claim against this Defendant upon which relief can be granted.

Second Defense.

Now responding to, and following the same numbering of paragraphs of, Count Two of the Complaint, Defendant answers and says:

1.

Defendant, for its answer to paragraph 1 of Count Two of the Complaint, hereby repeats, reiterates and

adopts its answers to paragraphs 1 to 14, both inclusive, of Count One of the Complaint.

2 and 3.

Defendant denies each and every allegation contained in paragraphs 2 and 3 of Count Two of the Complaint.

4.

Defendant, for its answer to paragraph 4 of said Count Two of the Complaint, hereby repeats, reiterates and adopts its answer to paragraphs 17, 18 and 19 of Count One of the Complaint, and denies the remainder of said paragraph 4 of Count Two of the Complaint.

Answer to Count Three.

First Defense.

Count Three of the Complaint fails to state a claim against this Defendant upon which relief can be granted.

Second Defense.

Now responding to, and following the same numbering of paragraphs of, Count Three of the Complaint, Defendant answers and says:

1.

Defendant, for its answer to paragraph 1 of Count Three of the Complaint, hereby repeats, reiterates

and adopts its answers to paragraphs 1 to 14, both inclusive, of Count One of the Complaint.

2 and 3.

Defendant denies each and every allegation contained in paragraphs 2 and 3 of Count Three of the Complaint.

4.

Defendant, for its answer to paragraph 4 of Count Three of the Complaint, hereby repeats, reiterates and adopts its answers to paragraphs 17, 18 and 19 of Count One of the Complaint, and denies the remainder of paragraph 4 of Count Three of the Complaint.

Answer to Count Four.

First Defense.

Count Four of the Complaint fails to state a claim against this Defendant upon which relief can be granted.

Second Defense.

Now responding to, and following the same numbering of paragraphs of, Count Four of the Complaint, Defendant answers and says:

1.

Defendant, for its answer to paragraph 1 of Count Four of the Complaint, hereby repeats, reiterates

and adopts its answers to paragraphs 1 to 13, both inclusive, of Count One of the Complaint.

2 and 3.

Inasmuch as paragraphs 2 and 3 of Count Four of the Complaint allege the existence, not of facts, but of statutory law of the Territory of Hawaii and the United States, no answer thereto is required.

4 and 5.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4 and 5 of Count Four of the Complaint, and, therefore, the allegations in said paragraphs 4 and 5 of the said Count are denied.

6.

Defendant denies each and every allegation contained in paragraph 6 of Count Four of the Complaint except Defendant admits that it was engaged, among other activities in the manufacture, for sale and distribution through interstate commerce, of certain chemical compounds and sold and shipped through interstate commerce to Magnolia Soy Products Company, a chemical solvent, to-wit: trichloroethylene, for use in extracting soybean oil from soybeans.

7.

Defendant denies each and every allegation contained in paragraph 7 of Count Four of the Complaint.

8.

Defendant denies each and every allegation contained in paragraph 8 of Count Four of the Complaint, except Defendant admits that it recommended the use of and sold and distributed trichloroethylene through interstate commerce as an extraction agent for the removal of oil from various types of agricultural products, including soybeans.

9 and 10.

Defendant denies each and every allegation contained in paragraphs 9 and 10 of Count Four of the Complaint.

11.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of Count Four of the Complaint, and, therefore, all allegations of Plaintiff in said paragraph 11 of Count Four of the Complaint are denied.

12.

Defendant denies each and every allegation contained in paragraph 12 of Count Four of the Complaint.

13.

Defendant denies each and every allegation contained in paragraph 13 of Count Four of the Com-

plaint. It is further specifically denied that any negligence of Defendant (which negligence is denied) was in any way related to or connected with any damage to Plaintiff and denies that Defendant violated, or failed to perform, any duty owed to the Plaintiff.

14.

Defendant, for answer to paragraph 14 of Count Four of the Complaint, hereby repeats, reiterates and adopts its answers to paragraphs 17, 18 and 19 of Count One of the Complaint.

15.

Defendant denies each and every allegation contained in paragraph 15 of Count Four of the Complaint.

16.

While this paragraph is nothing more than the conclusion of the pleader to which no answer is required, nevertheless, insofar as the same might be deemed proper pleading, the allegations of said paragraph 16 of Count Four of the Complaint are denied.

Third Defense.

For a third and further defense to the Complaint herein, and to each of the four Counts therein, Defendant alleges that this Court lacks jurisdiction over the person of this Defendant in that this Defendant is a corporation organized under the laws of the State of Delaware and was not and is not subject to ser-

vice of process within the Northern District of Mississippi.

Fourth Defense.

For a fourth and further defense to the Complaint herein, and to each of the four Counts therein, Defendant alleges that this Court lacks jurisdiction of the subject matter in that the Plaintiff is a citizen and resident of the Territory of Hawaii and Defendant is a citizen and resident of the State of Delaware, under the laws of which it was and is organized and wherein it has its domicile, the said Defendant not being subject to service of process in the Northern District of Mississippi, and no alleged cause of action accrued unto Plaintiff in the Northern District of Mississippi, and no act or omission of this Defendant is alleged to have occurred or been made in the Northern District of Mississippi.

Fifth Defense.

For a fifth and further defense to the Complaint herein, and to each of the four Counts therein, Defendant alleges that the venue of this action does not lie in the United States District Court for the Northern District of Mississippi, or the Greenville Division therein, but, on the contrary, venue lies, if the suit is maintainable at all, in the United States District Court for the Jackson Division of the Southern District of Mississippi.

And now having answered the Complaint, and each and every Count therein, Defendant prays to be dismissed with costs.

W. C. WELLS, III,
EARL T. THOMAS,
(Earl T. Thomas),
Attorneys for Defendant.

Address of each of above:
900 Lamar Life Building,
Jackson, Mississippi.
CARL E. GEUTHER,
7058 Du Pont Building,
Wilmington, Delaware.
WALTER D. FORD,
7055-A Du Pont Building,
Wilmington, Delaware.
WELLS, THOMAS & WELLS,
900 Lamar Life Building,
Jackson, Mississippi,
Of Counsel.

Affidavit of Service.

State of Mississippi,
County of Hinds.

Earl T. Thomas, being by me first duly sworn, states on oath that he has served the foregoing Answer on counsel for Plaintiff, by mailing this date, postage prepaid, true copies thereof respectively, to Winston C. Ingman and David N. Ingman, Esqs., 566 Alexander Young Building, Honolulu, Hawaii, Roger E. Brooks, Esq., 923-20th Street, N.W., Washington, D. C. and Wm. G. Burgin, Jr., Esq., Columbus, Mississippi. Attorneys for the Plaintiff.

EARL T. THOMAS,
(Earl T. Thomas).

Sworn to and subscribed before me, this January 13th, 1954.

JEWELL BEARD,
(Seal) Notary Public.

My Commission Expires Nov. 4, 1955.

Motion of Defendant for Summary Judgment;

Notice of Hearing on above Motion;

Affidavit of Clark B. Shepherd, dated 9/21/54;

Affidavit of R. Stuart Armstrong, dated 9/21/54;

Exhibit "A"—Opinion rendered by the Supreme Court of Miss., in Case E. I. Du Pont de Nemours & Co., vs. Frank Ladner, Case No. 39,116;

Exhibit "B"—Letter, E. I. Du Pont de Nemours & Co., to Lyman Reed, Sales Mgr., Magnolia Soy Products Co., dated 7/31/51;

Affidavit of Charles A. Cline, Jr., dated 9/29/54;

Order entered 1/18/55 Denying Motion of Defendant for Summary Judgment;

Memorandum relative to Motion for Consolation, etc.,

Omitted from the Printed Record, being heretofore copied at pages 54 et seq.

* * * * * * * *

Filed this 3 day of June 1954.

In the United States District Court for the Northern District of Mississippi.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,
v. Civil Action No. 145.
E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Counsel for plaintiff and defendant in the above-captioned cause hereby stipulate that the deposition of Frank Fernandez to be taken on June 9, 1954, at Lihue, Kauai, Territory of Hawaii, by Shiro Kashiwa, Esquire, in the matter of George T. Nishida and James E. Nishida, doing business as the Hilo Dairy Company of Kauai, a co-partnership, v. E. I. du Pont de Nemours & Company, a corporation, who will note his appearance as counsel for the plaintiff, may be used by plaintiff in this cause in the same manner and to the same extent said deposition could be used if taken by the plaintiff, Ryoju Sokei, subject to the procedures established by the Federal Rules of Civil Procedure.

INGMAN & INGMAN,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiff.

WM. G. BURGIN, JR.,
(Wm. G. Burgin, Jr.).

WELLS, THOMAS & WELLS,
CARL E. GEUTHER,
WALTER D. FORD,
By CARL E. GEUTHER,
Attorneys for Defendant.

Filed this 3 day of June 1954.

In the United States District Court for the Northern District of Mississippi.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,
v. Civil Action No. 145.
E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Counsel for plaintiff and defendant in the above-captioned cause hereby stipulate that the depositions of Lawrence W. Campos, Francis C. Ching, Thomas B. Cockett, Dr. Robert Cross, Desmond Fletcher, Dr. G. C. Folger, William R. Ford, Robert Gould, Max F. Landgraf, Louis V. Luck, Frank Olim, Dr. William F. Parker, Stanley H. N. Waldron, Dr. E. H. Willers and W. Y. Young be taken on June 17, 1954, at Honolulu, Territory of Hawaii, by C. Nils Tavares, Esquire, in the matter of Fred L. Waldron, Limited, v. E. I. du Pont de Nemours & Company, a corporation, who will note his appearance as counsel for the plaintiff, may be used by plaintiff in this cause in the same manner and to the same extent said depositions could be used if taken by the plaintiff, Ryoju Sokei, subject to the procedures established by the Federal Rules of Civil Procedure.

INGMAN & INGMAN,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiff.

WM. G. BURGIN, JR.,
(Wm. G. Burgin, Jr.).

WELLS, THOMAS & WELLS,
CARL E. GEUTHER,
WALTER D. FORD,
By CARL E. GEUTHER,
Attorneys for Defendant.

STIPULATION.

Filed this 28 day of July 1955.

In the United States District Court for the Northern District of Mississippi, Oxford Division.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,
v. Civil Action No. 145.
E. I. Du Pont de Nemours & Company, a corporation, Defendant.

Counsel for plaintiff and defendant in the above-entitled cause hereby stipulate and agree as follows:

That the plaintiff subject to, and only to, such objections as would be available to the defendant to the originals, may tender in evidence at the trial of this cause copies of original documents received by the defendant from Magnolia Soy Products Company, L. L. Ford, L. L. Ford Associates, Lyman Reed, Allen Jackson, O. H. Sale, James M. Warren and Davidson-Kennedy Company, set out and described in the Answer and Additional and Supplemental Answers of defendant in reply to Interrogatories of the plaintiff of record in this cause, said copies to be of the same force and effect for all purposes as the original documents would be, if offered and admitted in evidence.

Dated this 11th day of July, 1955.

WINSTON C. INGMAN and
DAVID N. INGMAN,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiff.
WELLS, THOMAS & WELLS,
CARL E. GEUTHER,
WALTER D. FORD,
By EARL T. THOMAS,
Attorneys for Defendant.

Memorandum as to Verdict;

Motion of Plaintiff for New Trial;

Order entered 2/2/56 Denying Motion of Plaintiff for New Trial;

Judgment entered 12/2/55;

Omitted from the Printed Record, being heretofore copied at pages 97 et seq.

* * * * * * * *

NOTICE OF APPEAL.

Filed this 1 day of March 1956.

In the United States District Court for the Northern District of Mississippi, Greenville Division.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,
v. Civil Action No. 145.
E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Plaintiff, Ryoju Sokei, doing business as Sokei Dairy, herein and hereby appeals to the United States District Court of Appeals for the Fifth Circuit from the judgment entered in the above-entitled cause on February 2, 1956, denying plaintiff's motion for a new trial.

INGMAN & INGMAN,
WILLIAM G. BURGIN, JR.,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiff

Motion of Plaintiffs to Extend time for Filing Record on Appeal in Appellate Court;

Order entered 4 10 56 Extending time to file Record on Appeal in Appellate Court;

Appellants' Designation of Contents of Record on Appeal;

Appellants' Statement of Points on Appeal;

Appellants' Designation of Record;

Motion of Plaintiffs' for Transmission of Original Depositions with the attached Exhibits to Appellate Court;

Order entered 5/21/56 transmitting Original Depositions and Exhibits in lieu of all copies to Appellate Court;

Appellee's Counter--Designation of Additional Portions of Contents of Record on Appeal;

Order entered 5/29/56 transmitting Original Depositions and Exhibits and Court Files in Lieu of all copies to Appellate Court;

Omitted from the Printed Record, being heretofore copied at pages 109 et seq.

. . . . . .

COMPLAINT.

Filed this 9 day of Dec. 1953.

In the United States District Court for the Northern District of Mississippi.

Fred L. Waldron, Limited, Plaintiff,
v. Civil Action No. 143.
E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Count One.

1. The plaintiff is a corporation, incorporated and existing by virtue of the laws of the Territory of Hawaii with its principal office at all times herein mentioned at 808 Fort Street, Honolulu, City and County of Honolulu, Territory of Hawaii.

2. The defendant is a corporation organized and existing under the laws of the State of Delaware, with its domicile and principal office in Wilmington, Delaware, and having qualified to do business and doing business in the State of Mississippi, and having appointed an agent for the service of process for suits in said state, to wit: J. H. Thompson, in Jackson, Hinds County, Mississippi, upon whom service of process may be had.

3. The matter in controversy exceeds the sum or value of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

4. The jurisdiction of the Court is invoked under Section 1332, Title 28, U. S. Code, June 25, 1948, c

646, 62 Stat. 930; and under the Federal Food, Drug and Cosmetic Act, Chapter 9, Title 21, U. S. Code, June 25, 1938, c. 675, 52 Stat. 1040.

5. During the years 1951 and 1952 and for a number of years prior thereto, the plaintiff has been engaged in and operated within the Territory of Hawaii a wholesale business, including the importation for sale within the said Territory of feed of all kinds for cattle.

6. On or about October 30, 1951, the plaintiff for a fixed consideration, ordered for purchase from The Brode Corporation, incorporated under the laws of the State of Tennessee with its principal office and place of business at 20-6 N. Front Street, 1012 Falls Building, Memphis, Tennessee, two hundred (200) tons of solvent soybean meal sacked in bags of 100 pounds each and the purchase order was accepted, and in confirmance thereof the said Brode Corporation issued at its said principal office under date of October 30, 1951, "Confirmation of Sale."

7. On receipt of the aforesaid order and on the said sale to plaintiff the aforementioned Brode Corporation, for a fixed consideration, placed an order of purchase for the said soybean meal with the Magnolia Soy Products Company, Greenville, Mississippi, with instructions to ship in interstate commerce the said meal from the mill of the company at Greenville, Mississippi, to the plaintiff at designated ports in the Territory of Hawaii, to wit, at Honolulu, Hilo and Port Allen, and the said Magnolia Soy Products Company did pursuant to the aforesaid instructions ship and deliver the said meal.

8. The said soybean meal, extracted with trichloroethylene, as manufactured by the mentioned Magnolia Company was placed at the Company's said mill in burlap bags, each bag containing 100 pounds of the said meal and each having attached the identification tag of the said Magnolia Company; the original bags so identified were received unopened by the plaintiff at said designated ports of the Territory of Hawaii, to wit, at Honolulu, Hilo and Port Allen, and as received were sold and delivered during the latter part of the year 1951 and in the early part of the year 1952, by the plaintiff to purchasers within the said Territory for feed for cattle, the said bags each with the identification tag of the said Magnolia Company remained as originally filled with the said meal and as shipped by the Company until opened by said purchasers for feeding to cattle by them owned in the said Territory and the said purchasers did feed the aforealleged meal to their dairy herds and other cattle with the result that many of the dairy cows and other cattle died and the remainder or part of the remainder became violently ill.

9. The said purchasers for years prior and continuously during the year 1951, the early part of the year 1952 and including the time of the occurrence of the transactions herein alleged purchased from the plaintiff cattle feed, including soybean meal and in all of said purchases the said purchasers relied exclusively on the skill and judgment of the plaintiff in selecting soybean meal of good quality and fit for consumption by cattle and the plaintiff in all of the sales to the purchasers aforementioned knew that any soybean meal purchased was for the sole purpose of feeding it by the purchasers to their dairy herds and other cattle.

10. The said Magnolia Soy Products Company prior to and including the time of the occurrence of the transactions and incidents herein alleged was engaged in the manufacture, distribution and sale of soybean meal, extracted with the chemical solvent trichloroehtylene, for feed for cattle and did during said period manufacture, sell and ship through interstate commerce the said meal for the purpose stated, including that sold, shipped and delivered to the plaintiff as aforesaid.

11. The defendant was engaged, among other activities, in the manufacture, for sale and distribution through interstate commerce, of certain chemical compounds and sold and shipped through interstate commerce, to Magnolia Soy Products Company a chemical solvent, to wit, trichloroethylene, for use in extracting soybean oil from soybeans, then and there well knowing that the soybean meal, from which the soybean oil was to be extracted by use of its product trichloroethylene was to be sold for cattle feed; the defendant at the time of making the sale of the aforesaid chemical solvent to Magnolia Soy Products Company then and there knew, or by the exercise of ordinary care should have known, that soybean meal which had the soybean oil extracted therefrom by the use of the said chemical solvent became unfit for and dangerous as food for cattle, and knew or by the exercise of ordinary care could have known that said solvent, if used for the purpose for which the defendant recommended, sold and delivered it to the Magnolia Soy Products Company for use by the Company in the manner which defendant knew it would be used, would cause the soybean meal to become poisonous to and unfit as food for cattle.

12. The defendant well knew, or should have known, that soybean meal, when processed with its manufactured product trichloroethylene for sale and delivery through interstate commerce for feed for cattle, was toxic and poisonous and would, when fed to cattle including the cattle of the purchasers set out and described in paragraph 8 of this Count One, result in great and serious damage and the defendant, through the sale and delivery of the said solvent for the aforesaid purpose then and there breached its implied warranty that soybean meal so manufactured would be fit and wholesome food for consumption by said purchasers' dairy herds and other cattle. The implied warranty was a material part and condition of the sale transaction and plaintiff relied on said warranty.

13. By reason of said breach of implied warranty, plaintiff has suffered great damage; the damages hereinafter claimed and alleged are damages for losses directly and proximately and naturally resulting in the ordinary course of events from the breach of warranty aforealleged by the defendant; at the time of the sale and delivery aforealleged the defendant well knew, or should have known, that all of the losses hereinafter set forth would directly and proximately result from the said sale and delivery of poisonous and toxic soybean meal; the poisonous and toxic condition of the said meal resulting directly from the use in its processing and manufacturing of trichloroethylene manufactured, sold and delivered by the defendant to the Magnolia Soy Products Company; all losses for which damages are hereinafter claimed were all reasonably foreseeable

14. Plaintiff suffered the following specific and special damages: From suits filed and claims asserted by the aforesaid purchasers of the said soybean meal against the plaintiff, $364,530.92; by reason of expenses and costs in connection with and arising out of the said suits and claims, $100,000.00; and from loss of profits suffered, the loss of profits which will be suffered and loss of good will, $90,000.00.

15. The plaintiff further claims as general damages the sum of $70,000.00. The total of plaintiff's damages, special and general, is $624,530.92.

16. Prior to the filing of this complaint the plaintiff requested and demanded of the defendant payment of damages as aforesaid but defendant has paid no part thereof and refuses to pay the said damages or any part thereof and there is now due and owing to the plaintiff from the defendant the total sum of $624,530.92 by reason of the breach of the aforesaid warranty.

Count Two.

1. Plaintiff reiterates and realleges all of the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Count One hereof.

2. The defendant at the time of the aforementioned sale of and delivery of its manufactured product, the chemical solvent trichloroethylene, to Magnolia Soy Products Company, knowing that the said Company would use the said solvent in extracting oil from soybeans, and that the residual meal sold and shipped in interstate commerce to the plaintiff at designated ports in the Territory of Hawaii, to wit, at Honolulu,

Hilo and Port Allen, and by the plaintiff sold and delivered to the aforesaid purchasers, as set out in Count One of this Complaint, for feed for cattle by them owned, impliedly warranted to all purchasers, including the plaintiff, that the said soybean meal was of merchantable quality; the implied warranty was a material part and condition of the sale transaction and the plaintiff relied on said warranty and the defendant well knew, or should have known, that the soybean meal manufactured through the use of the solvent trichloroethylene for sale and delivery through interstate commerce to the general public and to the plaintiff for sale by the latter within the Territory of Hawaii for feed for cattle, including the cattle owned by the said purchasers was toxic and poisonous and would, when fed to cattle, result in great and serious damage and the defendant at the time of the aforesaid sale and delivery to plaintiff as aforesaid then and there breached its implied warranty of merchantable quality of the said soybean meal, resulting in great damage to the plaintiff.

3. The damages set out and claimed in paragraphs 14 and 15 of Count One hereof are damages for losses directly and proximately and naturally resulting in the ordinary course of events from the breach by defendant of the aforesaid warranty of merchantable quality and were all reasonably foreseeable.

4. Plaintiff reiterates and realleges all of the allegations in paragraphs 14, 15 and 16 of Count One hereof and demands payment of the damages set out in said paragraphs 14 and 15 by reason of the aforesaid breach of the defendant's implied warranty of merchantable quality.

Count Three.

1. Plaintiff reiterates and realleges all of the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Count One hereof.

2. The defendant at the time of the aforementioned sale and at the time the said soybean meal was placed in burlap bags by Magnolia Soy Products Company at its plant at Greenville, Mississippi, for shipment in interstate commerce to plaintiff at designated ports in the Territory of Hawaii, to wit, Honolulu, Hilo and Port Allen, expressly warranted to all purchasers, including the plaintiff, that the contents of the aforementioned burlap bags, the said soybean meal, were of merchantable quality and fit for consumption by cattle and the express warranty was a material part and condition of the sales transaction and plaintiff relied on said warranty and the defendant well knew, or should have known, that the soybean meal manufactured and processed through the use of its chemical solvent trichloroethylene for sale and delivery through interstate commerce to plaintiff for sale within the Territory of Hawaii for feed for cattle, including the cattle of the aforesaid purchasers as set out in Count One of this Complaint, was toxic and poisonous and would, when fed to cattle, result in great and serious damage, and the defendant at the time of the aforesaid sale and delivery to plaintiff then and there breached its express warranty of the merchantable quality and fitness for consumption by cattle of the said soybean meal to the great damage of the plaintiff.

3. The damages set out and claimed in paragraphs 14 and 15 of Count One hereof are damages for losses

directly and proximately and naturally resulting in the ordinary cause of events from the breach by defendant of the aforesaid express warranty of merchantable quality and fitness for consumption by cattle and were all reasonably foreseeable by the defendant.

4. Plaintiff reiterates and realleges all of the allegations in paragraphs 14, 15 and 16 of Count One hereof and demands payment of the damages set forth in said paragraphs 14 and 15 by reason of the aforesaid breach of the defendant's express warranty of merchantable quality and fitness for consumption.

Count Four.

1. Plaintiff reiterates and realleges all of the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 of Count One hereof.

2. That at all times mentioned herein the laws of the Territory of Hawaii, as material herein, provided as follows:

"Chapter 41. Food, Drugs and Cosmetics.

Sec. 2201. Definitions. For the purpose of this part:

(d) 'Food' means (1) articles used for food or drink for man or animals. . . (3) articles used for components of any such article. . .

Sec. 2206. Prohibited acts. The following acts and the causing thereof within the Territory by any person are hereby prohibited: (a) The manufacture, sale, or delivery, holding or offering for sale of any food,

drug, device, or cosmetic that is adulterated or misbranded. . . (c) The receipt in commerce of any food, drug, device or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise. . .

Sec. 2209. Foods demmed to be adulterated when. A food shall be deemed to be adulterated: (a)(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 2213; or (3) if it consists in whole or in part of a diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been produced, prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health; . . .

3. That at all times mentioned herein the laws of the United States, as material herein, provided as follows:

Federal Food, Drug and Cosmetic Act (Vol. 5, FCA, Title 21)

"Sec. 321. Definitions; generally

(f) The term 'food' means (1) articles used for food or drink for man or other animals. . . .(3) articles used for components of any such article.

"Sec. 331. Prohibited acts.

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise. . ."

That the definition of adulterated food is the same as that recited above with relation to the laws of the Territory of Hawaii.

4. On or about October 30, 1951, the plaintiff for a fixed consideration ordered for purchase from The Brode Corporation, incorporated under the laws of the State of Tennessee with its principal office and place of business at 20—6 N. Front Street, 1012 Falls Building, Memphis, Tennessee, two hundred (200) tons of solvent soybean meal sacked in bags of one hundred pounds each, and the purchase order was accepted and in confirmation thereof the said Brode Corporation issued at Memphis, Tennessee, under date of October 30, 1951, "Confirmation of Sale" to the plaintiff.

5. On receipt of the aforesaid order from and on the said sale to plaintiff the aforementioned Brode

Corporation, for a fixed consideration placed an order of purchase for the said two hundred (200) tons of soybean meal with the defendant with instructions to the defendant to ship in interstate commerce the said meal from its mill at Greenville, Mississippi, to the plaintiff at designated ports in the Territory of Hawaii to wit, Honolulu, Hilo and Port Allen, and the defendant did pursuant to the aforesaid instructions ship and deliver the said meal.

6. The defendant was engaged, among other activities in the manufacture, for sale and distribution through interstate commerce, of certain chemical compounds and sold and shipped through interstate commerce to Magnolia Soy Products Company a chemical solvent, to wit, trichloroethylene, for use in extracting soybean oil from soybeans, then and there well knowing that the soybean meal, from which the soybean oil was to be extracted by use of its product trichloroethylene was to be sold for cattle feed; the defendant at the time of making the sale of the aforesaid chemical solvent to Magnolia Soy Products Company then and there knew, or by the exercise of ordinary care could have known, that soybean meal which had the soybean oil extracted therefrom by the use of the said chemical solvent became unfit for and dangerous as food for cattle, and knew or by the exercise of ordinary care could have known that said solvent, if used for the purpose for which the defendant recommended, sold and delivered it to the Magnolia Soy Products Company for use by the Company in the manner which defedant knew it would be used, would cause the soybean meal to become poisonous to and unfit as food for cattle, the defendant knew that the chemical solvent, trichloroethylene had caused death and injury to cattle when used for

the aforesaid purpose at numerous previous times and would in this instance.

7. The defendant, at the time of the sale of the chemical solvent and the delivery through interstate commerce to Magnolia Soy Products Company or at any time thereafter, failed and neglected to inform the said Company, the plaintiff or the general public that the aforesaid chemical solvent when used to extract soybean oil made the residual soybean meal poisonous and injurious to and unfit and unsound as food for cattle, the defendant owed a duty to do so and the failure to perform this duty constituted negligence.

8. The defendant recommended the use of and sold and distributed trichloroethylene through interstate commerce as a solvent to remove soybean oil from soybean meal, knowing that the residual meal was to be used as cattle food, knowing, or the defendant should have known, at the time of the sale and delivery of the trichloroethylene to Magnolia Soy Products Company that the Company would process, manufacture, market and distribute, through interstate commerce, to the general public the residual meal for use as cattle food and the said Company did manufacture, sell and distribute to the general public, including the plaintiff, soybean meal so processed with the aforesaid solvent, the defendant having knowledge or imputed knowledge of the dangerous qualities of the solvent trichloroethylene.

9. The defendant having knowledge or being chargeable with knowledge, of the use to be made by the Magnolia Soy Products Company of the de-

fendant's product trichloroethylene, the sale and distribution through interstate commerce of the residual meal and the danger to cattle of the meal when so processed as food for cattle, a duty arose on the part of the defendant to perform and carry out such test as would make certain that the aforesaid soybean meal would not be unfit, unsound and injurious to cattle when to them fed. This duty the defendant failed to perform, thus the defendant is guilty of negligence.

10. The soybean meal, the contents of the aforesaid burlap bags, was processed or manufactured through and by the use of solvent trichloroethylene, a product manufactured by and sold and delivered through interstate commerce by the defendant to the said Magnolia Soy Products Company. The said soybean meal so manufactured was highly toxic and poisonous and after delivery as aforesaid to plaintiff, and by plaintiff sold to the aforesaid purchasers set out in Count One of this Complaint and by the said purchasers fed, after delivery, to their dairy herds and other cattle by them owned, many of the dairy cows and other cattle died and the remainder or part of the remainder became violently ill.

11. The defendant, the manufacturer of the chemical trichloroethylene, knew, or should have known, that the trichloroethylene would be used for the stated purpose by the said Magnolia Soy Products Company, knew, or should have known, that the soybean meal resulting from the use of the said chemical would be sold and delivered through interstate commerce for feed for cattle and knew, or should have known, that the residual meal so processed was toxic and poison-

ous ard would, when fed to cattle, cause serious illness and death to cattle; notwithstanding such knowledge or imputed knowledge the defendant carelessly and negligently manufactured and delivered, as aforesaid the said chemical thereby and by reason thereof all and every injury of the plaintiff arising out of and by reason of the deaths and illnesses of the aforesaid cattle, as set forth in this complaint, were directly and proximately caused by the sale and use of the said trichloroethylene in the processing of soybeans resulting in the said poisonous and toxic meal.

12. There was a duty on the part of the defendant under the conditions and circumstances aforealleged to use reasonable care not to ship and deliver through interstate commerce the said trichloroethylene for use in the manufacture of soybean meal for feed for cattle, including the cattle of the aforesaid purchasers; the failure of the defendant to exercise due care constituted negligence.

13. Plaintiff reiterates and realleges all of the allegations in paragraphs 14, 15 and 16 of Count One hereof.

14. By reason of said negligence the plaintiff suffered great damage; the damages claimed are set out in paragraphs 14 and 15 of Count One hereof and are damages for losses directly and proximately and naturally resulting in the ordinary course of events from the negligence of the defendant as aforesaid, in that defendant well knew, or should have known, at the time of the said delivery of the aforesaid meal that it would be, from the use of the defendant's manufactured chemical trichloroethylene, poisonous

and toxic; that all of the losses aforesaid would directly and proximately result, for all of the losses for which damages are claimed as aforealleged were reasonably foreseeable.

15. The transaction upon which this cause of action is based is the same transaction alleged in Counts One, Two and Three of this Complaint.

Wherefore, the plaintiff demands judgment against the defendant in the sum of Six Hundred Twenty Four Thousand Five Hundred Thirty Dollars and Ninety-two Cents ($624,530.92).

PRATT, TAVARES & CASSIDY,
Alexander & Baldwin Building,
Honolulu, Hawaii.

ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiff.

923—20th Street, N. W.,
Washington, D. C.

DEMAND FOR JURY TRIAL.

The plaintiff demands a trial by jury on all issues.
ROGER E. BROOKS.

ANSWER OF E. I. DU PONT DE NEMOURS & COMPANY, DEFENDANT.

Filed this 14 day of Jan. 1954.

United States District Court for the Northern District of Mississippi, Greenville Division.

Fred L. Waldron, Limited, Plaintiff,
v. Civil Action No. 143.
E. I. Du Pont de Nemours & Company, a corporation, Defendant.

Now comes E. I. Du Pont de Nemours & Company, (hereinafter, for the sake of brevity, sometimes referred to variously as "Defendant," "this Defendant" or "du Pont"), the Defendant in the above entitled and numbered action, and files this, its Answer to the Complaint herein.

Answer to Count One.

First Defense.

Count One of the Complaint fails to state a claim against this Defendant upon which relief can be granted.

Second Defense.

Now responding to, and following the same numbering of paragraphs of, Count One of the Complaint, Defendant answers and says:

1.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of Count One of the Complaint, and, therefore, the allegations of said paragraph of Count One are denied.

2 and 3.

Defendant admits the allegations contained in paragraphs 2 and 3 of said Count One of the Complaint.

4.

Defendant admits that Plaintiff claims and invokes jurisdiction of this Court under the code sections and Acts of Congress referred to in paragraph 4 of Count One of the Complaint, but Defendant denies that this Honorable Court has jurisdiction of either the subject matter or the parties.

5-10 inclusive.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 5, 6, 7, 8, 9 and 10 of Count One of the Complaint, and, therefore, each and every allegation contained in all of

said paragraphs in Count One of the Complaint are denied.

11.

Defendant denies each and every allegation of paragraph 11 of Count One of the Complaint, except Defendant admits that it was engaged, among other activities, in the manufacture, for sale and distribution through interstate commerce, of certain chemical compounds and sold and shipped through interstate commerce, to Magnolia Soy Products Company, a chemical solvent, to-wit: trichloroethylene, for use in extracting soybean oil from soybeans.

12 and 13.

Defendant denies each and every allegation contained in paragraphs 12 and 13 of Count One of the Complaint.

14 and 15.

For answer to paragraphs 14 and 15 of Count One of the Complaint, Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs 14 and 15 of said Count One, as to alleged damages or losses from suits filed and claims asserted by purchasers of soybean meal against Plaintiff, losses as to expenses and costs in connection with or arising out of said suits and claims, loss of profits allegedly suffered or to be suffered, loss of good will, and further general damages, and therefore, all allegations of Plaintiff in said paragraphs 14 and 15 are denied.

Defendant denies that any and all such alleged losses referred to in paragraphs 14 and 15 of Count One were the result of any negligence of the Defendant, or any act, or failure to act, or violation of any duty, by the Defendant.

16.

Defendant admits that Plaintiff has made demand upon it prior to the filing of this Complaint for payment of $624,530.92, and admits that Defendant has paid no part thereof and that Defendant has refused to pay said sum or any part thereof; but Defendant denies each and every other allegation contained in said paragraph 16 of Count One of the Complaint.

Answer to Count Two.

First Defense.

Count Two fails to state a claim against this Defendant upon which relief can be granted.

Second Defense.

Now responding to, and following the same numbering of paragraphs of, Count Two of the Complaint, Defendant answers and says:

1.

Defendant, for its answer to paragraph 1 of Count Two of the Complaint, hereby repeats, reiterates and adopts its answers to paragraphs 1 to 11, both inclusive, of Count One of the Complaint.

2 and 3.

Defendant denies each and every allegation contained in paragraphs 2 and 3 of Count Two of the Complaint.

4.

Defendant, for its answer to paragraph 4 of said Count Two of the Complaint, hereby repeats, reiterates and adopts its answer to paragraphs 14, 15 and 16 of Count One of the Complaint, and denies the remainder of said paragraph 4 of Count Two of the Complaint.

Answer to Count Three.

First Defense.

Count Three of the Complaint fails to state a claim against this Defendant upon which relief can be granted.

Second Defense.

Now responding to, and following the same numbering of paragraphs of, Count Three of the Complaint, Defendant answers and says:

1.

Defendant, for its answer to paragraph 1 of Count Three of the Complaint, hereby repeats, reiterates and adopts its answers to paragraphs 1 to 11, both inclusive, of Count One of the Complaint.

2 and 3.

Defendant denies each and every allegation contained in paragraphs 2 and 3 of Count Three of the Complaint.

4.

Defendant, for its answer to paragraph 4 of Count Three of the Complaint, hereby repeats, reiterates and adopts its answers to paragraphs 14, 15 and 16 of Count One of the Complaint, and denies the remainder of paragraph 4 of Count Three of the Complaint.

Answer to Count Four.

First Defense.

Count Four of the Complaint fails to state a claim against this Defendant upon which relief can be granted.

Second Defense.

Now responding to, and following the same numbering of paragraphs of, Count Four of the Complaint, Defendant answers and says:

1.

Defendant, for its answer to paragraph 1 of Count Four of the Complaint, hereby repeats, reiterates and adopts its answers to paragraphs 1 to 10, both inclusive, of Count One of the Complaint.

2 and 3.

Inasmuch as paragraphs 2 and 3 of Count Four of the Complaint allege the existence, not of facts, but of statutory law of the Territory of Hawaii and the United States, no answer thereto is required.

4.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of Count Four of the Complaint, and, therefore, the allegations in said paragraph 4 of the said Count are denied.

5.

Defendant denies each and every allegation contained in paragraph 5 of Count 4 of the Complaint

6.

Defendant denies each and every allegation contained in paragraph 6 of Count Four of the Complaint except Defendant admits that it was engaged among other activities in the manufacture, for sale and distribution through interstate commerce, of certain chemical compounds and sold and shipped through interstate commerce to Magnolia Soy Products Company, a chemical solvent, to-wit: trichloroethylene for use in extracting soybean oil from soybeans.

7.

Defendant denies each and every allegation contained in paragraph 7 of Count Four of the Complaint

8.

Defendant denies each and every allegation contained in paragraph 8 of Count Four of the Complaint.

9-11, inclusive.

Defendant denies each and every allegation contained in paragraphs 9, 10 and 11 of Count Four of the Complaint.

12.

Defendant denies each and every allegation contained in paragraph 12 of Count Four of the Complaint. It is further specifically denied that any negligence of Defendant (which negligence is denied) was in any way related to or connected with any damage to Plaintiff and denies that Defendant violated, or failed to perform, any duty owed to the Plaintiff.

13.

Defendant, for answer to paragraph 13 of Count Four of the Complaint, hereby repeats, reiterates and adopts its answers to paragraphs 14, 15 and 16 of Count One of the Complaint.

14.

Defendant denies each and every allegation contained in paragraph 14 of Count Four of the Complaint.

15.

While this paragraph is nothing more than the conclusion of the pleader to which no answer is required,

nevertheless, insofar as the same might be deemed proper pleading, the allegations of said paragraph 15 of Count Four of the Complaint are denied.

Third Defense.

For a third and further defense to the Complaint herein, and to each of the four Counts therein, Defendant alleges that this Court lacks jurisdiction over the person of this Defendant in that this Defendant is a corporation organized under the laws of the State of Delaware and was not and is not subject to service of process within the Northern District of Mississippi.

Fourth Defense.

For a fourth and further defense to the Complaint herein, and to each of the four Counts therein, Defendant alleges that this Court lacks jurisdiction of the subject matter in that the Plaintiff is a citizen and resident of the Territory of Hawaii and Defendant is a citizen and resident of the State of Delaware, under the laws of which it was and is organized and wherein it has its domicile, the said Defendant not being subject to service of process in the Northern District of Mississippi, and no alleged cause of action accrued unto Plaintiff in the Northern District of Mississippi, and no act or omission of this Defendant is alleged to have occurred or been made in the Northern District of Mississippi.

Fifth Defense

For a fifth and further defense to the Complaint herein, and to each of the four Counts therein, De-

fendant alleges that the venue of this action does not lie in the United States District Court for the Northern District of Mississippi, or the Greenville Division therein, but, on the contrary, venue lies, if the suit is maintainable at all, in the United States District Court for the Jackson Division of the Southern District of Mississippi.

And now having answered the Complaint, and each and every Count therein, Defendant prays to be dismissed with costs.

W. C. WELLS, III,
EARL T. THOMAS,
(Earl T. Thomas),
Attorneys for Defendant.

CARL E. GEUTHER,
Address of each of above:
900 Lamar Life Building,
Jackson, Mississippi.

7058 Du Pont Building,
Wilmington, Delaware.
WALTER D. FORD,
7055-A Du Pont Building,
Wilmington, Delaware.

WELLS, THOMAS & WELLS,
900 Lamar Life Building,
Jackson, Mississippi,
Of Counsel.

Affidavit of Service.

State of Mississippi.
County of Hinds.

Earl T. Thomas, being by me first duly sworn, states on oath that he has served the foregoing An-

swer on counsel for Plaintiff, by mailing this date, postage prepaid, true copies thereof respectively, to Pratt, Tavares & Cassidy, Esqs., Alexander & Baldwin Building, Honolulu, Hawaii, Roger E. Brooks, Esq., 923-20th Street, N.W., Washington, D. C. and Wm. G. Burgin, Jr., Esq., Columbus, Mississippi, Attorneys for the Plaintiff.

EARL T. THOMAS,
(Earl T. Thomas).

Sworn to and subscribed before me, this January 13th, 1954.

JEWELL BEARD,
(Seal) Notary Public.

My Commission Expires Nov. 4, 1955.

Motion of Defendant for Summary Judgment;

Notice of Hearing on above motion;

Affidavit of Clerk B. Shepherd, dated 9 21 54;

Affidavit of R. Stuart Armstrong, dated 9 21 54;

Exhibit "A"—Opinion rendered by the Supreme Court of Miss., in Case E. I. Du Pont de Nemours & Co., vs. Frank Ladner, Case No. 39,116;

Exhibit "B"—Letter, E. I. Du Pont de Nemours & Co., to Lyman Reed, Mgr., Magnolia Soy Products Co., dated 7 31 51;

Affidavit of Charles A. Cline, Jr., dated 9/29/54;

Order entered 1/18/55 Denying Motion of Defendant for Summary Judgment;

Memorandum relative to Motion for Consolidation, etc.;

Omitted from the Printed Record, being heretofore copied at pages 54 et seq.

* * * * * * * *

In the United States District Court for the Northern District of Mississippi.

Filed this 3 day of June 1954.

Fred L. Waldron, Limited, Plaintiff,
v. Civil Action No. 143.
E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Counsel for plaintiff and defendant in the above-captioned cause stipulate that the depositions of Elmer Sokei, Walter Friedlander and Dr. Rex Glaysier to be taken on June 10, 1954, at Lihue, Kauai, Territory of Hawaii, by Winston C. Ingman, Esquire, in the matter of Ryoju Sokei v. E. I. du Pont de Nemours & Company, a corporation, who will note his appearance as counsel for the plaintiff, may be used by plaintiff in this cause in the same manner and to the same extent said depositions could be used if taken by the plaintiff, Fred L. Waldron, Limited, sub-

ject to the procedure established by the Federal Rules of Civil Procedure.

PRATT, TAVARES & CASSIDY,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiff.

WM. G. BURGIN, JR.,
(Wm. G. Burgin, Jr.).

WELLS, THOMAS & WELLS,
CARL E. GEUTHER,
WALTER D. FORD,
By CARL E. GEUTHER,
Attorneys for Defendant.

In the United States District Court for the Northern District of Mississippi.

Filed this 3 day of June 1954.

Fred L. Waldron, Limited, Plaintiff,
v. Civil Action No. 143.
E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Counsel for plaintiff and defendant in the above-captioned cause hereby stipulate that the depositions of S. Yama, Frank Fernandez, and James E. Nishida to be taken on June 9, 1954, at Lhue, Kauai, Territory of Hawaii, by Shiro Kashiwa, Esquire, in the matter of George T. Nishida and James E. Nishida, doing business as the Hilo Dairy Company of Kauai, a co-partnership, v. E. I. du Pont de Nemours & Company,

a corporation, who will note his appearance as counsel for the plaintiff, may be used by plaintiff in this cause in the same manner and to the same extent said depositions could be used if taken by the plaintiff, Fred L. Waldron, Limited, subject to the procedures established by the Federal Rules of Civil Procedure.

PRATT, TAVARES & CASSIDY,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiff.

WM. G. BURGIN, JR.,
(Wm. G. Burgin, Jr.).

WELLS, THOMAS & WELLS,
CARL E. GEUTHER,
WALTER D. FORD,
By CARL E. GEUTHER,
Attorneys for Defendant.

STIPULATION.

Filed this 28 day of July 1955.

In the United States District Court for the Northern District of Mississippi, Oxford Division.

Fred L. Waldron, Limited, Plaintiff,
v. Civil No. 143.
E. I. Du Pont de Nemours & Company, a Corporation, Defendants.

Counsel for plaintiffs and defendant in the above-entitled cause hereby stipulate and agree as follows:

That the plaintiff subject to, and only to, such objections as would be available to the defendant to the originals, may tender in evidence at the trial of this cause copies of original documents received by the defendant from Magnolia Soy Products Company, L. L. Ford, L. L. Ford Associates, Lyman Reed, Allen Jackson, O. H. Sale, James M. Warren and Davidson-Kennedy Company, set out and described in the Answer and Additional and Supplemental Answers of defendant in reply to Interrogatories of the plaintiff of record in this cause, said copies to be of the same force and effect for all purposes as the original documents would be, if offered and admitted in evidence.

Dated this 11th day of July, 1955.

PRATT, TAVARES & CASSIDY,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiff.
WELLS, THOMAS & WELLS,
CARL E. GEUTHER,
WALTER D. FORD,
By EARL T. THOMAS,
Attorneys for Defendant

Memorandum as to Verdict;

Motion of Plaintiff for New Trial;

Order entered 2 2 56 Denying Motion of Plaintiff for New Trial;

Judgment entered 12 2 55;

Omitted from the Printed Record, being heretofore copied at pages 98 et seq.

. . . . . .

NOTICE OF APPEAL.

Filed this 1 day of March 1956.

In the United States District Court for the Northern District of Mississippi, Greenville Division.

Fred L. Waldron, Limited, Plaintiff,
v. Civil Action No. 143
E. I. Du Pont de Nemours & Company, a Corporation, Defendant.

Plaintiff, Fred L. Waldron, Limited, herein and hereby appeals to the United States District Court of Appeals for the Fifth Circuit from the judgment entered in the above-entitled cause on February 2, 1956, denying plaintiff's motion for a new trial.

PRATT, TAVARES & CASSIDY,
WILLIAM G. BURGIN, JR.,
ROGER E. BROOKS,
By ROGER E. BROOKS,
(Roger E. Brooks),
Attorney for Plaintiff

Motion of Plaintiffs to Extend Time for Filing Record on Appeal in Appellate Court;

Order entered 4 10 56 Extending time to file Record on Appeal in Appellate Court;

Appellants' Designation of Contents of Record on Appeal;

Appellants' Statement of Points on Appeal;

Appellants' Designation of Record;

Motion of Plaintiffs' for transmission of Original Depositions with the attached Exhibits to Appellate Court;

Order entered 5/21/56 transmitting Original Depositions and Exhibits in lieu of all copies to Appellate Court;

Appellee's Counter-Designation of additional portions of Contents of Record on Appeal;

Order entered 5 29 56 transmitting Original Depositions and Exhibits and Court Files in lieu of all copies to Appellate Court;

Omitted from the Printed Record, being heretofore copied at pages 109 et seq

. . . . . .

PLAINTIFFS' REQUEST FOR INSTRUCTIONS.

In he United States District Court for the Northern District of Mississippi.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. Civil Action No. 142

E. I. Du Pont De Nemours & Company, Defendant.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,

v. Civil Action No. 145

E. I. Du Pont De Nemours & Company, a Corporation, Defendant.

Fred L. Waldron, Limited, Plaintiff,

v. Civil Action No. 143

E. I. Du Pont De Nemours & Company, a Corporation, Defendant.

Come now plaintiffs above mentioned and hereby respectfully request that the following instructions No. 1 to No. 20 be given to the jury in the above-entitled causes.

Dated: November 29th, 1955.

PRATT, TAVARES & CASSIDY, SHIRO KASHIWA, INGMAN & INGMAN, WILLIAM G. BURGIN, JR., ROGER E. BROOKS,

By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiffs

Plaintiffs' No. 1.

The Court instructs the jury that throughout these instructions, to follow, unless it is specifically stated in any instruction that it applies only to a particular case mentioned, the instruction applies to all three cases.

Plaintiffs' No. 2.

The Court instructs the jury that the care of a prudent man varies according to circumstances dependent upon the degree of danger. What is the precise legal intent of the term "ordinary care" must, in the nature of things, depend upon the circumstances of each individual case. It is a relative and not an absolute term. The degree of care and foresight which is necessary in any given case must always be in proportion to the nature and magnitude of the injuries and damages which might result from the occurrence which is to be anticipated and guarded against.

Plaintiffs' No. 3.

The Court instructs the jury that under the Federal Food, Drug and Cosmetic Act the causing of the introduction into interstate commerce of soy bean oil meal which is known to be intended for cattle feed and which is unfit for cattle feed is prohibited.

The said Act further prohibits the shipment in interstate commerce of tri solvent which the sender knows may become a component part of feed that is unfit for cattle and is intended to be sold for cattle feed.

The said Act further prohibits the shipment of tri solvent in interstate commerce unless the container thereof bears a label specifically informing prospective users as to its safe use.

The material provisions of this Act are attached to this instruction.

The Court instructs the jury that the Federal Food, Drug and Cosmetic Act provides, as material herein, as follows:

"Sec. 31. The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded.

(b) The adultration or misbranding of any food, drug, device or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded and the delivery or proffered delivery thereof for pay or otherwise

(d) —

"Sec. 201. For the purposes of this Act —

(a) The term 'Territory' means any Territory or possession of the United States—

(b) The term "interstate commerce" means (1) commerce between any state or territory—.

(e) The term "person" includes individual partnership, corporation—.

(f) The term 'food' means (1) articles used for food or drink for man or other animals (2) chewing gum, and (3) articles used for components of any such article.

(g) The term "drug" means (1) articles recognized in the official United States Pharmacopcia.

(k) The term "label" means a display of written, pr nted or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this act that any word, statement or other information appearing on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

(m) The term "labeling" means all label and other written, printed or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

(n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not representations made or suggested by statement, word,

design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in labeling thereof or under such conditions of use as are customary or usual.

(p) The term "new drug" means—

(1) Any drug the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of drugs, as safe for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a "new drug" if at any time prior to the enactment of this Act it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use—

Sec. 303.(a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both imprisonment and fine.

Sec. 402. A food shall be deemed to be adulterated—(a)(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considréd adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 406; (406(a) reads as follows:

Sec. 406. (a) Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2) of section 402(a);)

or (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held, under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;—

Sec. 403. A food shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular. (f) If any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the

ordinary individual under customary conditions of purchase and use.

Sec. 502. A drug or device shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular. (c) If any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use. (f) Unless its labeling bears (1) adequate directions for use;—(j) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof.

Sec. 505(a) No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an application filed pursuant to subsection (b) is effective with respect to such drug.

(b) Any person may file with the Secretary an application with respect to any drug subject to the provisions of subsection (a). Such persons shall submit to the Secretary as a part of the application (1) full reports of investigations which have been made to show whether or not such drug is safe for use; (2) a full list of the articles used as components of such drug; (a) a full statement of the composition of such drug; (4) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing and packing of such drug;

(5) such samples of such drug and of the articles used as components thereof as the Secretary may require; and (6) specimens of the labeling proposed to be used for such drug.

(c) An application provided for in subsection (b) shall become effective on the sixtieth day after the filing thereof unless prior to such day the Secretary by notice to the applicant in writing postpones the effective date of the application to such time (not more than one hundred and eighty days after the filing thereof) as the Secretary deems necessary to enable him to study and investigate the application.

Plaintiffs' No. 4.

The Court instructs the jury that if you find by a preponderance of the evidence that the defendant, in shipping tri solvent in interstate commerce to Magnolia Soy Products Company in the manner and at the times shown by the evidence violated the Federal Pure Food, Drug and Cosmetic Act, then by reason of such violation, the defendant was guilty of negligence as a matter of law in so shipping such tri solvent, and, unless you further find that the defendant was exonerated by an intervening cause, as covered by other instructions, then your verdict should be for the plaintiffs.

Plaintiffs' No. 5.

The Court instructs the jury that if you find by a preponderance of the evidence that, in or as a result of shipping tri solvent in interstate commerce to Magnolia Soy Products Company, the defendant vio-

lated any provision of the Federal Food, Drug and Cosmetic Act, such violation is evidence, to be considered with all other evidence to determine whether the defendant was negligent in such shipping of tri solvent.

Plaintiffs' No. 6.

The Court instructs the jury that the Hawaii Food, Drug and Cosmetic Act, of the Territory of Hawaii, provides that the causing of the sale, delivery or receipt in the Territory of Hawaii of feed which is known to be intended to be sold for cattle feed and which is unfit for consumption by cattle is prohibited. If you find from a preponderance of the evidence that Magnolia Soy Products Company, hereinafter called Magnolia, was engaged in the business of manufacturing soy bean oil meal using the tri process, and that the defendant sold tri solvent to Magnolia with knowledge that Magnolia would manufacture such meal and sell the same in interstate commerce for use as cattle feed, and that the defendant knew, or by the exercise of due care should have known, that such meal when eaten by cattle was toxic to them, and that the defendant did not, before the meal involved in each suit was shipped to the Territory of Hawaii, adequately warn Magnolia that such meal might be toxic to cattle and did not label its tri solvent when sold to Magnolia in such manner as to indicate that such meal manufactured therewith would be toxic to cattle if eaten by them, and if you further find that the meal which was shipped from Magnolia was the proximate cause of the cattle deaths and illnesses claimed by the respective plaintiff or plaintiffs in the suit, such action on the part

of the defendant would be a violation of the Hawaii Food, Drug and Cosmetic Act, and such a violation, if so found by you, would be evidence of negligence on the part of the defendant.

Plaintiffs' No. 7.

The Court instructs the jury the proximate cause of an event must be understood to be that which in a natural sequence, unbroken by any new unforseeable intervening cause, produced that event and without which the event would not have happened.

Plaintiffs' No. 8.

The Court instructs the jury that a new and independent cause is an intervening efficient force which breaks the casual connection between the original wrong and the injury. Such new force must be sufficient of itself to stand as the cause of the injury and be one but for which the injury would not have occurred. The term "new" refers to and means a cause incapable of being reasonably foreseen by the original wrongdoer by the use of ordinary care on his part; and the word "independent" refers to and means the absence of the relation of cause and effect between the new cause and the original wrongful act or omission. And, unless the intervening cause is both new and independent, sufficient of itself to stand as the cause of the injury, breaking the causal connection, the original wrongdoer is not relieved from the legal responsibility for his wrong or negligence.

Plaintiffs' No. 9.

The Court instructs the jury that if you find that defendant du Pont induced Magnolia Soy Products Company (sometimes called "Magnolia" in these instructions), or the predecessors in interest of Magnolia, or both, to construct a tri-process mill for the manufacture of soy bean oil meal for sale as cattle feed, upon the representation by defendant that the tri-process would produce soy bean oil meal that would be fit for cattle feed and not toxic to cattle; and if you further find that the defendant was negligent in so doing; and if you further find that the damages to the plaintiffs were caused by the subsequent acts of Magnolia in manufacturing and selling such meal; then such subsequent acts of Magnolia would not be a sufficient intervening cause to discharge the defendant from liability for its negligence if:

(a) du Pont at the time of its negligent acts should have realized that Magnolia would so act; or

(b) a reasonable man, knowing the situation existing when Magnolia's acts causing the injury to plaintiffs took place, would not regard Magnolia's said actions as highly extraordinary; or

(c) Magnolia's acts which caused the injuries to plaintiffs were a normal response to a situation created by du Pont's conduct and the manner in which Magnolia acted was not extraordinarily negligent.

Plaintiffs' No. 10.

The Court instructs the jury that an intervening act of a third person, negligent in itself, is not a superseding cause of injury to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or (b) a reasonably prudent man knowing the existing situation when the act of the third person was done would not regard it as highly extraordinary that the third person should so act. Therefore, if you find from a preponderance of the evidence that the construction of the mill of the Magnolia Soy Products Company as a mill designed to use only the trichloroethylene process of extraction was negligently induced by the defendant through representations that the trichloroethylene process would produce soy bean oil meal fit for cattle feed; that the defendant sold tri solvent to the Magnolia Soy Products Company knowing that it was to be used by that Company to manufacture soy bean oil meal for sale in interstate commerce as cattle feed; and that the actions of the defendant prior to the sale of the soy bean oil meal which was ultimately purchased by plaintiffs and used in feeding their cattle, or prior to the time when they received the same in the Territory of Hawaii, were not such as would have caused a reasonably prudent man to desist from selling such meal for cattle feed, or were such that a reasonably prudent man in the position of the defendant knew or should have known that the said Company would continue to sell such meal in interstate commerce for cattle feed and would not have regarded sale of tri meal for cattle feed by said

Company as highly extraordinary under the circumstances, then your verdict should be for the plaintiffs.

Plaintiffs' No. 11.

With respect to the claim made by the defendant that the acts of a third person (namely, Magnolia Soy Products Company) intervened between the commission of any act or acts of the defendant that might be considered negligent and the actual occurrence of the damages claimed by each of the plaintiffs, the Court instructs the jury that, if you find that a reasonable person in the situation of defendant would or should have realized that there was a realizable likelihood that said Company would act in a particular manner, and that this was the hazard or one of the hazards which made the defendant negligent in act or acts, then such intervening acts, whether innocent, negligent, intentionally tortious or criminal, does not or do not prevent the defendant from being liable to plaintiff or plaintiffs.

Plaintiffs' No. 12.

The Court instructs the jury that, where a manufacturer of an article knows, or in the exercise of ordinary care should know, that such article will be put to a certain use and that such use will create unusual hazards, there arises a duty on the part of such manufacturer to adequately warn all those who may reasonably be expected to be injured or damaged by a lack of such adequate warning. Whether any warning, if given, is adequate, is a question of fact for the jury to decide under all the circum-

stances. If, therefore, you find that a reasonably prudent person under the circumstances the defendant was in, would have warned not only Magnolia Soy Products Company but all classes of persons each of the plaintiffs was situated in, and no such warning was given by defendant to plaintiffs nor was any reasonable effort made by defendant to warn persons generally in such situation of each of the plaintiffs, such an act of omission is evidence of negligence on the part of the defendant.

Plaintiffs' No. 13.

The Court instructs the jury that the question of whether the letter of July 31, 1951, all plaintiffs' Exhibit No. 35, delivered by Stuart Armstrong to L. L. Ford and Lyman Reed of Magnolia Soy Products Company on or about August 2nd or 3rd, 1951, was adequate notice to that Company so as to prevent the defendant from being liable to plaintiffs for any negligent acts (if you find that the defendant did commit such negligent acts), is a question of fact to be decided by the jury in the light of all of the circumstances as found by you. These circumstances may include any circumstances which you find would have influenced a reasonably prudent man in the same situation as the Magnolia Company in determining whether or not the situation required or justified his ceasing immediately to make any further sales of tri-processed soy bean meal for purposes of cattle feed, and may include circumstances and happenings prior to, at the time of, or a reasonable time subsequent to, the delivery of that letter and before the shipping by the Magnolia Company of any of the meal that caused the damage to the plaintiff or plain-

tiffs (if you find that such damage was caused by such meal). The question, so far as the Magnolia Company was concerned, is what a reasonable person would have understood the letter to mean under all of the relevant circumstances as so found by you.

Plaintiffs' No. 14.

The Court instructs the jury that where a manufacturer supplies an article which he manufactures or produces, to be used for a particular purpose under such circumstances that the buyer necessarily trusts to or relies upon the judgment and skill of such manufacturer to furnish an article of that type that is fit for the particular purpose, there is an implied warranty that such article shall be fit for said purpose for which it is to be used. There is also an implied warranty, under such circumstances, that the article is merchantable for such purpose.

Plaintiffs' No. 15.

The Court instructs the jury that the implied warranty of a manufacturer of fitness for a particular use or of merchantability for such use, is not only to the immediate buyer of the article, but for the benefit of all persons whom defendant reasonably forsaw, or should reasonably have foreseen, might be injured if the product did not measure up to the quality as warranted and such party, if injured or damaged by such failure to conform to the warranted quality, may have a remedy for breach of warranty against the manufacturer.

Plaintiffs' No. 16.

The Court instructs the jury that if concurrent or successive negligence of two persons combined results in injury to a third person, he may recover of either or both.

Plaintiffs' No. 17.

The Court instructs the jury that the measure of damages for loss of or injury to cattle is the difference between the reasonable market value immediately before the injury or loss and the reasonable market values immediately after the injury or loss.

Plaintiffs' No. 18.

The Court instructs the jury that, if your verdict is in favor of a particular plaintiff, that plaintiff is entitled to damages, if any, caused by way of death of cows, calves, injury or damage to cows or calves, loss of profits, if any, loss of customers, if any, loss of good will, if any, reasonable cost of drugs and veterinary services, if any, other expenses, if any, reasonably and necessarily incurred in connection with and as a result of the illness or death of cows and calves, or in making reasonable efforts to ascertain the cause of the cattle illnesses and deaths, or to minimize damages, or to protect the herds and businesses of the respective plaintiffs, or any combination of said expenses, which damages, losses, and expenses the jury finds to have proximately resulted from or been caused by the defendant's wrongful act or acts.

Plaintiffs' No. 19.

The Court instructs the jury that, although these three cass, namely, (1) Nishida v. du Pont, Civil Action No. 142, (2) Sokei v. du Pont, Civil Action No. 145, and (3) Waldron v. du Pont, Civil Action No. 143, have been consolidated for trial, you are to bring in separate verdicts in each action. Forms of verdict will be handed you by the Court, in each action, for each count in that action, and you will render your verdict on each such count in such manner as the facts as found by you and the law as given you by the Court may warrant. The Court will now explain the reason for submitting to you several counts in each action. The Rules of Civil Procedure of this Court permit a plaintiff, when he brings a suit to state his cause of action or claim in several different ways, so as to attempt to cover the various possible situations that he believes the evidence might establish. In this consolidated action, each complaint in each of the three cases was originally drawn with four counts, called Count One, Count Two, Count Three, and Count Four. The Plaintiffs have all withdrawn their Count Three, so that you should disregard that count in each action.

Count One, in each action, is a count drawn on the theory or claim that, by various acts claimed by plaintiffs to have been committed by the defendant, the defendant impliedly warranted that soy bean oil meal when manufactured or extracted by the use of trichloroethylene was fit and wholesome feed for cattle, and that the defendant breached or violated that warwanty and thereby proximately caused damage to plaintiffs.

Count Two, in each action, is a count drawn on the theory or claim that by various acts claimed by plaintiffs to have been committed by the defendant, the defendant impliedly warranted that soy bean oil meal, when manufactured or extracted by the use of trichloroethylene (sometimes called "tri" in these instructions), was of merchantable quality for cattle feed—that is, that it was of a quality fit to be sold for use as cattle feed, and that the defendant breached or violated that warranty and thereby proximately caused damage to plaintiffs.

Count Four, in each action, is a count drawn on the theory or claim that by various acts claimed by plaintiffs to have been committed by defendant, including alleged violations of the Federal Food, Drug and Cosmetic Act and the Food, Drug and Cosmetic Act of the Territory of Hawaii known as the Hawaii Food, Drug and Cosmetic Act, or of the said Hawaii Food, Drug and Cosmetic Act alone, the defendant was guilty of negligence and thereby proximately caused damage to plaintiffs.

Under the forms of verdict to be handed to you in each of the three actions, you may bring in a verdict on each count either in favor of the plaintiff or plaintiffs or in favor of the defendant, as the facts found by you and the law as given by the Court may warrant. If you find in favor of the plaintiff or plaintiffs on any particular count, you should determine the amount of damages which in your judgment, based upon the evidence and the instructions of this Court, will fairly and justly compensate the plaintiff or plaintiffs for the damage suffered by such plaintiff or plaintiffs and proximately caused by any

wrongful acts of the defendant which you may find to have been committed.

Plaintiffs' No. 20.

The Court instructs the jury that, if your verdict is in favor of the plaintiffs, then the following rules will govern in computing damages, if any, which might be predicated upon any settlements or payments made by Fred L. Waldron, Limited, with or to the seven dairymen on the Island of Hawaii, the Territory of Hawaii in relation to alleged damages suffered on the Island of Oahu, and Hilo Dairy and Sokei Dairy:

(a) You are instructed that the contracts of Waldron with the respective seven daires on the Island of Hawaii and that with said Territory of Hawaii, fix the amount of the damages to Waldron for those particular items, namely, the claims of said seven dairies and of said Territory, the defendant having stipulated, subject to its defenses claimed on the merits, that these amounts are reasonable.

(b) You are instructed that, in considering any damages suffered by Waldron, you should not include in any award to Waldron any amounts advanced by Waldron to Hilo Dairy or Sokei Dairy under the settlement contracts between Waldron and each of those dairies, Nishida Plaintiffs' Exhibit No. 15 and Sokei Plainiff's Exhibit No. 15. Under these contracts, the Hilo Dairy and the Sokei Dairy are obligated under certain circumstances to repay such advances to Waldron, depending upon the amounts of their respective recoveries, if they recover against

the defendant. Therefore, such advances should neither be included in any damages awarded to Waldron, nor deducted from any damages awarded to either Hilo Dairy or Sokei Dairy. In this way, double payments of any damages awarded can be avoided. However, if you find that the making of such advances was necessary and reasonable on Waldron's part under all the circumstances, and that the making of such advances caused a shortage of credit or working capital to Waldron and this contributed to Waldron's damages, you may take into consideration any such effects of shortening credit or working capital in computing Waldron's damages, though not adding the payments themselves to any verdict for Waldron.

Do Not Print (as Counsel for the parties dispense with the same by Stipulation.) John A. Feehan, Jr., Clerk.

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Do Not Print (as Counsel for the parties dispense with the same by Stipulation.) John A. Feehan, Jr., Clerk.

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Do Not Print (as Counsel for the parties dispense with the same by Stipulation.) John A. Feehan, Jr., Clerk.

* * * * * * * *

"[Caption omitted. Filed November 28, 1955. The following Motion was made in each of the three cases appealed from in identical language, except when the word 'Plaintiff' hereinafter appears, the applicable word in the Nishida case is 'Plaintiffs'.]" John A. Feehan, Jr., Clerk.

MOTION OF DEFENDANT FOR A DIRECTED VERDICT.

United States District Court for the Northern District of Mississippi, Greenville Division.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,
v. Civil Action No. 145.
E. I. Du Pont De Nemours & Company, a corporation, Defendant.

Defendant, E. I. du Pont de Nemours & Company, moves the Court, at the close of Plaintiff's case, to direct a verdict in favor of Defendant in this cause as to the Complaint herein, and any and all counts thereof and therein, on the grounds:

1.

The evidence is insufficient to warrant a finding of liability against this Defendant on any theory and on any count herein.

2.

The evidence is insufficient to justify a finding against this Defendant of a violation of a duty, either

contractual or tortious, growing out of the circumstances pleaded or proven in this case.

3.

The evidence requires a finding that any damage suffered by this Plaintiff is the sole, direct and proximate result of the negligence or violation of duty of others than this Defendant.

4.

The evidence requires a finding that there was no privity of contract or duty sufficient to permit a violation thereof between the Plaintiff and the Defendant, and therefore, as a matter of law, the Defendant is entitled to a directed verdict.

5.

The evidence requires a finding, as a matter of law, that the negligence of Defendant, du Pont, if any, was superseded by a new and independent efficient intervening force, in that Magnolia Soy Products Company, after the receipt of the warning letter of date July 31, 1951, from du Pont, voluntarily and wilfully manufactured and sold the soybean meal which was placed into the channels of trade which allegedly caused the damage complained of herein.

6.

The evidence requires a finding, as a matter of law, that the negligence, if any, of Defendant, du Pont, did not proximately cause or contribute to the damages allegedly suffered by the Plaintiff herein.

7.

The evidence in the instant case fails, as a matter of law, to establish any negligence or violation of contractual duty on the part of Defendant, du Pont, which contributed to the damages complained of herein.

8.

The evidence requires a finding, as a matter of law, that as between Defendant and this Plaintiff, there was no privity of contract, no consideration present, and no reliance obtained therein, and no breach or violation of duty.

9.

The record is absolutely barren of any testimony to show privity of contract between the Plaintiff and Defendant herein, and accordingly the Defendant is entitled to a verdict as a matter of law.

10.

The evidence is insufficient, as a matter of law, to establish that the product sold by the Defendant in and of itself was either the causative or contributing agent of the Plaintiff's damage claimed herein, because the record is entirely devoid of proof establishing the part played by the manufacturer of the meal in the processing thereof, either as to the degree of heat used, efficiency of the equipment involved, adequacy of the processes employed, or the age and maturity of the raw materials utilized.

11.

The evidence requires a finding, as a matter of law, that the negligence of Defendant Du Pont, if any, was superseded by a new and independent efficient intervening force in that Magnolia Soy Products Company, after the receipt of the warning letter of date July 31, 1951 from Defendant Du Pont, voluntarily and willfully manufactured and sold soy bean meal which was placed into the channels of trade which allegedly caused the damage complained of herein, and which conclusion has, on the same identical facts, been reached by the Supreme Court of Mississippi in the case of E. I. Du Pont De Nemours & Company vs. Ladner, ... Miss. ..... 73 So. 2d 249, and which decision, under the direct and indirect results and implications, including subsequent decisions relating thereto of Erie Railroad Company vs. Tompkins, 58 S. Ct. 817, 304 U.S. 64, 82 L. Ed. 1188 (1938) is binding upon this Honorable Court as to the weight and sufficiency of evidence necessary to constitute a new independent efficient intervening force, and the Defendant herein is accordingly entitled, as a matter of law, to a verdict.

12.

The evidence, including the judicial knowledge of the Court, requires a finding that the law of the Territory of Hawaii recognizes the common law doctrines of proximate causation and intervening act, and that the Supreme Court of Mississippi in the case of E. I. Du Pont De Nemours & Company vs. Ladner, ... Miss. ....., 73 So. 2d 249 (1954), has decided that the quantum of fact—in the precise

circumstances as here involved—was sufficient herein to constitute a new and independent efficient intervening cause superseding the negligence, if any, of the Defendant Du Pont. Under the Conflict of Laws principles as expressed by Mississippi law and under the direct and indirect results and implications of Erie Railroad Company vs. Tompkins, 58 S. Ct. 817, 304 U.S. 64, 82 L. Ed. 1188 (1938), the decision of the Supreme Court of Mississippi in the case of E. I. Du Pont De Nemours & Company vs. Ladner (supra) is binding upon this Honorable Court, and the matter being Stare Decisis, this Defendant Du Pont is entitled to a verdict as a matter of law.

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MEMORANDUM OF AMENDMENTS PROPOSED TO COMPLAINT IN NISHIDA V. DU PONT, CIVIL ACTION NO. 142.

1. Count One, page 1, second line of paragraph 1, change "Kappa" to "Kapaa".

2. Count One, page 2, second from last line of paragraph 7, change "200" to "300".

3. Count One, page 4, tenth and thirteenth lines of paragraph 14, change "could" to "should". Add, at end of paragraph 14, the following new allegations:

"Despite the knowledge of the dangerous qualities and character of said soybean meal manufactured or to be manufactured by the said use of its trichloroethylene, as set forth in this Count, possessed by and imputable to the said defendant, the defendant wilfully, recklessly, negligently and without regard for the rights, safety or protection of any prospective purchasers of such meal, sold and delivered such trichloroethylene to the said Magnolia Soy Products Company, well knowing that the said Company would use the said solvent in extracting oil from soybeans and that the soybean meal so manufactured or processed would be sold to purchasers in interstate commerce for use as cattle feed. And defendant well knew or by the exercise of reasonable care should have known, when making such sales and deliveries of trichloroethylene to said Company, that such purchasers of said meal would or might include plaintiffs".

4. Count Two, page 6, fifth line of paragraph 2, add, after the word "meal" the words "would be",

so that the amended portion will read "meal would be sold and shipped", etc.

5. Count Four, page 11, add to paragraph 8, at end thereof, the following new allegations:

"In so doing, the defendant acted wilfully, recklessly, negligently and without regard for the rights, safety or protection of any prospective purchasers of said meal, including plaintiffs".

"(Caption omitted. Filed November 28, 1955. The following Motion was made in each of the three cases appealed from, in identical language, except when the word 'Plaintiff' hereinafter appears, the applicable word in the Nishida case is 'Plaintiffs', and except in the Waldron case, Paragraph 7 is entirely omitted.)"

JOHN A. FEEHAN, JR.,
Clerk.

MOTION OF DEFENDANT FOR A DIRECTED VERDICT.

United States District Court for the Northern District of Mississippi, Greenville Division.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,
v. Civil Action No. 145.
E. I. Du Pont de Nemours & Company, a corporation, Defendant.

Defendant, E. I. du Pont de Nemours & Company, moves the Court, at the close of Plaintiff's case, to

direct a verdict in favor of Defendant in this cause as to Counts One, Two and Three of the Complaint, hereinafter referred to as the contract counts, on the grounds:

1.

There is absolutely no evidence to establish any contractual relationship or resulting contractual duty between the Plaintiff and the Defendant herein, and as a matter of law, Defendant is entitled to a directed verdict on Counts One, Two and Three, heretofore and for convenience termed the contract counts.

2.

There is absolutely no evidence to establish the existence of privity of contract between the Plaintiff and Defendant herein, and as a matter of law, Defendant is entitled to a directed verdict on Counts One, Two and Three, heretofore and hereafter termed the contract counts.

3.

There is absolutely no evidence to establish the existence of privity of contract between the Plaintiff and Defendant herein, and the only contract involving the Defendant in this case being that entered into between the Defendant and the meal producer, Magnolia Soy Products Company, and having been entered into under the law of New York by the undisputed evidence herein, and that said jurisdiction of New York requiring the existence of privity as a prerequisite for the enforcement of contractual or war-

ranty rights, the Defendant is entitled to a directed verdict as a matter of law on Counts One, Two and Three, heretofore and hereafter designated the contract counts.

4.

There is absolutely no evidence to establish reliance by the Plaintiff on any implied or express representation of the Defendant nor any evidence to indicate that any such implied or express representation was ever made to the Plaintiff, and in the absence of such reliance, no action for alleged breach of warranty can lie, and Defendant is entitled to a directed verdict on Counts One, Two and Three, hereinbefore and hereafter designated as the contract counts, as a matter of law.

5.

There is absolutely no evidence to establish that any sale was made to the Plaintiff by the Defendant herein, and in the absence of such sale, there can be no action for a breach of either express or implied warranties, and the Defendant is entitled to a directed verdict, as a matter of law, on Counts One, Two and Three, hereinbefore and hereafter designated as the contract counts.

6.

There is absolutely no evidence to establish that the Plaintiff purchased, by repurchase or subpurchase, any article manufactured or sold by the Defendant. On the contrary, the evidence establishes

conclusively that the Defendant sold only a product used and entirely consumed in the processing and manufacturing of meal by an independent company, not a party to this lawsuit, who subsequently sold it. Having neither direct privity of contract nor even the remote relationship of vendor and subpurchaser, the Defendant owed no contractual duty to the Plaintiff and is entitled to a directed verdict, as a matter of law, on Counts One, Two and Three, hereinbefore and hereafter designated the contract counts.

7.

The Defendant is entitled to a verdict, as a matter of law, on Counts One, Two and Three, hereinbefore referred to as the contract counts, since both the allegata and probata fail to establish either the allegations of reliance upon the Defendant in the purchase of soybean meal or the proof of such reliance. Paragraph 9 of this Complaint pleads that the "Plaintiff relied exclusively on the skill and judgment of the said" Waldron, the immediate seller of the feed, and this allegation is supported by the proofs.

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Of Counsel.

MEMORANDUM OF AMENDMENTS PROPOSED TO COMPLAINT IN WALDRON V. DU PONT, CIVIL ACTION NO. 143.

1. Count One, page 2, paragraph 5, first line at top of said page 2, insert after the word "wholesale" the words "and retail".

2. Count One, page 2, paragraphs 6 and 7, amend said paragraphs to read, respectively as follows:

"6. On or about October 30 and November 30, 1951, the plaintiff, for a fixed consideration in each instance, ordered for purchase from The Brode Corporation, incorporated under the laws of the State of Tennessee with its principal office and place of business at 20-6 N. Front Street, 1012 Falls Building, Memphis, Tennessee, a total of 300 tons of soybean meal sacked in bags of 100 pounds each and the purchase orders were accepted, and in confirmance thereof the said Brode Corporation issued at its said principal office under the respective dates of October 30 and November 30, 1951, a 'Confirmation of Sale' for each of said orders.

"7. As a result of, and pursuant to, said respective orders, soybean meal ordered by The Brode Corporation from, and manufactured by, the Magnolia Soy

Products Company, Greenville, Mississippi, was shipped in interstate commerce, and delivered, to plaintiff at designated ports in the Territory of Hawaii towit, at Honolulu, Hilo, Port Allen and Nawiliwili, or some of them, the arrangements for said shipping being made by said Brode Corporation or said Magnolia Soy Products Company, or both, and said meal being shipped to said ports in said Territory from the mill of said Magnolia Soy Products Company in said Greenville".

3. Count One, page 2, paragraph 8, seventh line, after the word "Hilo" insert a comma followed by the word "Nawiliwili".

4. Count One, page 4, paragraph 11, insert, at end of said paragraph 11, the following new allegations:

"Despite the knowledge of the dangerous qualities and character of the said soybean meal manufactured or to be manufactured by the said use of its trichloroethylene, as set forth in this Count, possessed by and imputable to the said defendant, the defendant wilfully, recklessly, negligently and without regard for the rights, safety or protection of any prospective purchasers of such meal, sold and delivered such trichloroethylene to the said Magnolia Soy Products Company, well knowing that the said Company would use the said solvent in extracting oil from soybeans and that the soybean meal so manufactured or processed would be sold to purchasers in interstate commerce for use as cattle feed. And defendant well knew, or by the exercise of reasonable care should have known, when making such sales and deliveries of trichloroethylene to said company, that said pur-

chasers of said meal would or might include plaintiff and purchasers from plaintiff".

5. Count One, page 4, paragraph 14, third line, change "$364,530.92" to "$120,000.00".

6. Count One, page 5, paragraph 14, third line from top of said page 5, change "$90,000.00" to "$200,000.00".

7. Count One, page 5, paragraph 15, second line, change "$70,000.00" to "$200,000.00".

8. Same paragraph 15, third line, change "$624,530.92" to "$620,000.00".

9. Count Two, page 5, paragraph 2, sixth line, insert after the word "Hilo" a comma followed by the word "Nawiliwili".

10. Count Three, page 6, paragraph 2, first line, change "time" to "times" and "sale" to "sales", second line, change "time" to "times."

11. Same paragraph, page 6, fifth line, after the word "Hilo" insert a comma, followed by the word "Nawiliwili".

12. Same paragraph, page 7, first line at top of page, change "time" to "times", "sale" to "sales" and "delivery" to "deliveries."

13. Count Four, pages 8 to 9, delete paragraphs 4 and 5.

14. Count Four, renumber paragraphs 6 to 14, both inclusive, pages 9 through 12, as paragraphs 4 to 12 respectively.

15. Count Four, page 12, renumber paragraph 15 as paragraph 13 and amend the paragraph to read as follows:

"13. The transactions upon which this cause of action are based are the same transactions alleged in Counts One, Two and Three of this complaint".

16. Count Four, page 12, amend the prayer to read as follows:

"Wherefore, the plaintiff demands judgment against the defendant in the sum of Six Hundred Twenty Thousand and No/100 Dollars, ($620,000.00)".

MEMORANDUM OF AMENDMENTS PROPOSED TO COMPLAINT IN SOKEI V. DU PONT, CIVIL ACTION NO. 145.

1. Count One, page 2, first line of paragraph 7, amend entire line to read as follows:

"7. In December, 1951, and January, 1952".

2. Same paragraph 7, sixth and seventh lines, change "380" to "220".

3. Same paragraph 7, eighth line, insert, after the words "December, 1951" the word "and".

4. Same paragraph 7, eighth and ninth lines, change the comma to a semicolon following the words "January, 1951", and strike out the words "and 160 sacks were ordered in February, 1952".

5. Same paragraph 7, eleventh line, change "380" to "220".

6. Count One, page 3, paragraph 10, first and eighth lines, change "380" to "220".

7. Count One, page 4, amend paragraphs eleven and twelve to read, respectively, as follows:

"11. On or about October 30 and November 30, 1951, the said Waldron, Limited, for a fixed consideration in each instance, ordered for purchase from The Brode Corporation, incorporated under the laws of the State of Tennessee with its principal office and place of business at 20-6 N. Front Street, 1012 Falls Building, Memphis, Tennessee, a total of 300 tons of soybean meal sacked in bags of 100 pounds each and the purchase orders were accepted, and in confirmance thereof the said Brode Corporation issued at its principal office under the respective dates of October 30 and November 30, 1951, a 'Confirmation of Sale' for each of said orders.

"12. As a result of, and pursuant to said respective orders, soybean meal ordered by The Brode Corporation from, and manufactured by, the Magnolia Soy Products Company, Greenville, Mississippi, including said 220 bags of soybean meal, was shipped in interstate commerce, and delivered, to said Waldron, Limited at Port Allen or Nawiliwili, in the Territory

of Hawaii, the arrangements for said shipping being made by said Brode Corporation or said Magnolia Soy Products Company, or both, and said meal being shipped to sand port or ports in said Territory from the mill of said Magnolia Soy Products Company in said Greenville."

8. Count One, page 4, paragraph 13, third and seventh lines, change "380" to "220".

9. Same paragraph 13, fifth line, insert after the words "Port Allen" the words "or at Nawiliwili".

10. Count One, page 5, paragraph 14, seventh and eleventh lines from top of page 5, change "could" to "should".

11. Same paragraph, 14, add, at end thereof, the following new allegations:

"Despite the knowledge of the dangerous qualities and character of the said soybean meal manufactured or to be manufactured by the said use of its trichloroethylene, as set forth in this Count, possessed by and imputable to the said defendant, the defendant wilfully, recklessly, negligently and without regard for the rights, safety or protection of any prospective purchasers of such meal, including plaintiff, sold and delivered such trichloroethylene to the said Magnolia Soy Products Company, well knowing that the said Company would use the said solvent in extracting oil from soybeans and that the soybean meal so manufactured or processed would be sold to purchasers in interstate commerce for use as cattle feed. And defendant well knew, or by the exercise of reasonable

care should have known, when making such sales and deliveries of trichloroethylene to said Company, that such purchasers of said meal would or might include plaintiff".

12. Count Two, page 7, paragraph 2, fifth and ninth lines, change "380" to "220".

13. Same paragraph, 6th line, insert after the words "Port Allen" the words "or Nawiliwili".

14. Count Three, page 8, paragraph 2, second and sixth lines, change "380" to "220".

15. Count Four, page 10, paragraph 4, first and second lines, amend both lines to read as follows:

"4. In or about the months of December 1951, and January, 1952, plaintiff, for a fixed consideration in each instance ordered for purchase from Fred L. Waldron, Limited, Honolulu,".

16. Same paragraph 4, third line, change "380" to "220".

17. Same paragraph 4, fifth and sixth lines, in each of said lines, after the word "consideration" insert the words "in each instance".

18. Count Four, page 10, paragraph 5, third line, change "380" to "220".

19. Same paragraph 5, fourth line, insert after the words "Port Allen" the words "or Nawiliwili".

20. Count Four, page 11, paragraph 6, tenth and thirteenth lines, change "could" to "should".

21. Count Four, page 12, paragraph 8, add, at end of said paragraph, the following new allegations:

"In so doing, the defendant acted wilfully, recklessly, negligently and without regard for the rights, safety or protection of any prospective purchasers of said meal, including plaintiff".

22. Count Four, page 12, paragraph 11, first line, change "380" to "220".

Do Not Print (as Counsel for the parties dispense with the same by Stipulation.)

JOHN A. FEEHAN, JR.,
Clerk.

* * * * * * * *

Do Not Print (as Counsel for the parties dispense with the same by Stipulation.)

JOHN A. FEEHAN, JR.,
Clerk.

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Do Not Print (as Counsel for the parties dispense with the same by Stipulation.)

JOHN A. FEEHAN, JR.,
Clerk.

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Do Not Print (as Counsel for the parties dispense with the same by Stipulation.)

JOHN A. FEEHAN, JR.,
Clerk.

* * * * * * * *

"(Caption omitted. Filed November 29, 1955. The following Motion was made in each of the three cases appealed from, in identical language, except when the word 'Plaintiff' hereinafter appears, the applicable word in the Nishida case is 'Plaintiffs'.)"

JOHN A. FEEHAN, JR.,
Clerk.

MOTION OF DEFENDANT FOR A DIRECTED VERDICT.

United States District Court for the Northern District of Mississippi, Greenville Division.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,
v. Civil Action No. 145.
E. I. Du Pont de Nemours & Company, a corporation,
Defendant.

Defendant, E. I. du Pont de Nemours & Company, moves the Court, at the close of all the evidence in this case, to direct a verdict in favor of Defendant in this cause as to the Complaint herein, and any and all counts thereof and therein, on the grounds:

1.

The evidence is insufficient to warrant a finding of liability against this Defendant on any theory and on any count herein.

2.

The evidence is insufficient to justify a finding against this Defendant of a violation of a duty, either contractual or tortious, growing out of the circumstances pleaded or proven in this case.

3.

The evidence requires a finding that any damage suffered by this Plaintiff is the sole, direct and proximate result of the negligence or violation of duty of others than this Defendant.

4.

The evidence requires a finding that there was no privity of contract or duty sufficient to permit a violation thereof between the Plaintiff and the Defendant, and therefore, as a matter of law, the Defendant is entitled to a directed verdict.

5

The evidence requires a finding, as a matter of law, that the negligence of Defendant, du Pont, if any, was superseded by a new and independent efficient intervening force, in that Magnolia Soy Products Company, after the receipt of the warning letter

of date July 31, 1951, from du Pont, voluntarily and wilfully manufactured and sold the soybean meal which was placed into the channels of trade which allegedly caused the damage complained of herein.

6.

The evidence requires a finding, as a matter of law, that the negligence, if any, of Defendant, du Pont, did not proximately cause or contribute to the damages allegedly suffered by the Plaintiff herein.

7.

The evidence in the instant case fails, as a matter of law, to establish any negligence or violation of contractual duty on the part of Defendant, du Pont, which contributed to the damages complained of herein.

8.

The evidence requires a finding, as a matter of law, that as between Defendant and this Plaintiff, there was no privity of contract, no consideration present, and no reliance obtained therein, and no breach or violation of duty.

9.

The record is absolutely barren of any testimony to show privity of contract between the Plaintiff and Defendant herein, and accordingly the Defendant is entitled to a verdict as a matter of law.

10.

The evidence is insufficient, as a matter of law, to establish that the product sold by the Defendant, in and of itself was either the causative or contributing agent of the Plaintiff's damage claimed herein, because the record is entirely devoid of proof establishing the part played by the manufacturer of the meal in the processing thereof, either as to the degree of heat used, efficiency of the equipment involved, adequacy of the processes employed, or the age and maturity of the raw materials utilized.

11.

The evidence requires a finding, as a matter of law, that the negligence of Defendant Du Pont, if any, was superseded by a new and independent efficient intervening force in that Magnolia Soy Products Company, after the receipt of the warning letter of date July 31, 1951 from Defendant Du Pont, voluntarily and willfully manufactured and sold soy bean meal which was placed into the channels of trade which allegedly caused the damage complained of herein, and which conclusion has, on the same identical facts, been reached by the Supreme Court of Mississippi in the case of E. I. Du Pont De Nemours & Company vs. Ladner, ...Miss.... 73 So. 2d 249, and which decision, under the direct and indirect results and implications, including subsequent decisions relating thereto, of Erie Railroad Company vs. Tompkins, 58 S. Ct. 817, 304 U.S. 64, 82 L. Ed 1188 (1938) is binding upon this Honorable Court as to the weight and sufficiency of evidence necessary to constitute a new independent efficient intervening force, and

the Defendant herein is accordingly entitled, as a matter of law, to a verdict.

12.

The evidence, including the judicial knowledge of the Court, requires a finding that the law of the Territory of Hawaii recognizes the common law doctrines of proximate causation and intervening act, and that the Supreme Court of Mississippi in the case of E. I. Du Pont De Nemours & Company, vs. Ladner, ...Miss...., 73 So. 2d 249 (1954), has decided that the quantum of fact—in the precise circumstances as here involved—was sufficient herein to constitute a new and independent efficient intervening cause superseding the negligence, if any, of the Defendant Du Pont. Under the Conflict of Laws principles as expressed by Mississippi Law and under the direct and indirect results and implications of Erie Railroad Company vs. Tompkins, 58 S. Ct. 817, 304 U.S. 64, 82 L. Ed. 1188 (1938), the decision of the Supreme Court of Mississippi in the case of E. I. Du Pont De Nemours & Company vs. Ladner (supra) is binding upon this Honorable Court, and the matter being Stare Decisis, this Defendant Du Pont is entitled to a verdict as a matter of law.

W. C. WELLS, III,
EARL T. THOMAS,
(Earl T. Thomas),
Attorneys for the Defendant,
E. I. Du Pont de Nemours
& Company.

Address of Each of the Above:
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CARL E. GEUTHER,
7100 Du Pont Building,
Wilmington 98, Delaware.
WELLS, THOMAS & WELLS,
900 Lamar Life Building,
Jackson, Mississippi,
Of Counsel.

"(Caption omitted. Filed November 29, 1955. The following Motion was made in each of the three cases appealed from, in identical language, except when the word 'Plaintiff' hereinafter appears, the applicable word in the Nishida case is 'Plaintiffs', and in the Waldron case, Paragraph 7 is entirely omitted.)"

JOHN A. FEEHAN, JR.,
Clerk.

MOTION OF DEFENDANT FOR A DIRECTED VERDICT.

United States District Court for the Northern District of Mississippi, Greenville Division.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,
v. Civil Action No. 145.
E. I. Du Pont de Nemours & Company, a corporation,
Defendant.

Defendant, E. I. du Pont de Nemours & Company, moves the Court, at the close of all the evidence in

this case, to direct a verdict in favor of Defendant in this cause as to Counts One, Two and Three of the Complaint, hereinafter referred to as the contract counts, on the grounds:

1.

There is absolutely no evidence to establish any contractual relationship or resulting contractual duty between the Plaintiff and the Defendant herein, and as a matter of law, Defendant is entitled to a directed verdict on Counts One, Two and Three, heretofore and for convenience termed the contract counts.

2.

There is absolutely no evidence to establish the existence of privity of contract between the Plaintiff and Defendant herein, and as a matter of law, Defendant is entitled to a directed verdict on Counts One, Two and Three, heretofore and hereafter termed the contract counts.

3.

There is absolutely no evidence to establish the existence of privity of contract between the Plaintiff and Defendant herein, and the only contract involving the Defendant in this case being that entered into between the Defendant and the meal producer, Magnolia Soy Products Company, and having been entered into under the law of New York by the undisputed evidence herein, and that said jurisdiction of New York requiring the existence of privity as a prerequisite for the enforcement of contractual or

warranty rights, the Defendant is entitled to a directed verdict as a matter of law on Counts One, Two and Three, heretofore and hereafter designated the contract counts.

4.

There is absolutely no evidence to establish reliance by the Plaintiff on any implied or express representation of the Defendant nor any evidence to indicate that any such implied or express representation was ever made to the Plaintiff, and in the absence of such reliance, no action for alleged breach of warranty can lie, and Defendant is entitled to a directed verdict on Counts One, Two and Three, hereinbefore and hereafter designated as the contract counts, as a matter of law.

5.

There is absolutely no evidence to establish that any sale was made to the Plaintiff by the Defendant herein and in the absence of such sale, there can be no action for a breach of either express or implied warranties, and the Defendant is entitled to a directed verdict, as a matter of law, on Counts One, Two and Three, hereinbefore and hereafter designated as the contract counts.

6.

There is absolutely no evidence to establish that the Plaintiff purchased, by repurchase or subpurchase, any article manufactured or sold by the Defendant. On the contrary, the evidence establishes

conclusively that the Defendant sold only a product used and entirely consumed in the processing and manufacturing of meal by an independent company, not a party to this lawsuit, who subsequently sold it. Having neither direct privity of contract nor even the remote relationship of vendor and subpurchaser, the Defendant owed no contractual duty to the Plaintiff and is entitled to a directed verdict, as a matter of law, on Counts One, Two and Three, hereinbefore and hereafter designated the contract counts.

7.

The Defendant is entitled to a verdict, as a matter of law, on Counts One, Two and Three, hereinbefore referred to as the contract counts, since both the allegata and probata fail to establish either the allegations of reliance upon the Defendant in the purchase of soybean meal or the proof of such reliance. Paragraph 9 of this Complaint pleads that the "Plaintiff relied exclusively on the skill and judgment of the said" Waldron, the immediate seller of the feed, and this allegation is supported by the proofs.

W. C. WELLS, III.
EARL T. THOMAS.
(Earl T. Thomas).
Attorneys for the Defendant,
E. I. Du Pont de Nemours
& Company.

Address of Each of the Above:
900 Lamar Life Building,
Jackson, Mississippi.

CARL E. GEUTHER,
7100 Du Pont Building,
Wilmington 98, Delaware.

WELLS, THOMAS & WELLS,
900 Lamar Life Building,
Jackson, Mississippi,
Of Counsel.

(Title Omitted.)

Proceedings.

The Court:
The matter we are about to take up this morning is the cases of George T. Nishida and James E. Nishida, and Ryoju Sokei, and Fred L. Waldron, Limited, against Magnolia Soy Products Company, and E. I. Du Pont De Nemours and Company, a Corporation, and the Brode Corporation.
Are the plaintiffs ready?

Mr. Burgin:
The plaintiffs are ready, if the Court please.

The Court:
Are the defendants ready?

Mr. Thomas:
The defendants are ready, if the Court please.

The Court:
I would like to say this to Counsel before proceeding to qualify the jurors.

When these two juries were originally drawn, there were two men who happened to live out at Carrollton.

Mississippi, and they come and go from their home together. One of them was on Jury No. 1, and one of them was on Jury No. 2. I have agreed to transfer certain members of the jury so that they both might be on the same jury and continue to travel together. I don't know whether either one of them is for you or against you. Both are regular jurors, and I just want you to understand that part of it.

Put me a jury in the box, Mr. Marshal.

The Marshal:

Jury No. 2 come around.

The Court:

Gentlemen, and I would like all of you other jurors who may be back in the Courtroom, to give close attention to what I am saying to these gentlemen, so that I won't have to repeat everything to you, should some of these be excused.

Gentlemen, this is the case in which some gentlemen from the Hawaiian Islands, who are the plaintiffs in this lawsuit, are suing the Magnolia Soy Products Company, a company that was engaged in the manufacture of soybean meal here in Greenville, and the E. I. Du Pont De Nemours, a Delaware Corporation, which during the trial, I am sure will be referred to as Du Pont, and the Brode Corporation of Memphis, Tennessee. Those were originally the individuals and parties involved.

Now the plaintiffs, whom I have stated, are from Hawaii, are the Messrs. Nishida, George T. Nishida and James E. Nishida, who were operating as the Hilo Dairy of Kauai, in the Hawaiian Islands, and another gentlemen by the name of Ryoju Sokei, who was doing business as the Sokei Dairy, also in the

Hawaiian Islands, and Fred L. Waldron, Limited, that being a firm in Honolulu, engaged in the handling of dairy products, feed, and such items.

Now the attorneys in the case representing the plaintiffs are Mr. Shiro Kashiwa, of Honolulu, and Mr. C. Nils Tavares of Honolulu, and Mr. William G. Burgin of Columbus, Mississippi, and Mr. Brooks of Washington, D. C.

Representing the defendants in this case are Mr. Earl T. Thomas of the law firm of Wells, Thomas and Wells, of Jackson, Mississippi and Mr. Carl E. Geuther of Wilmington, Delaware.

Are any of you gentlemen related to any of the parties involved in this case, or to their attorneys?

(A negative reply was received.)

The Court:

Do any of you gentlemen know anything about the facts of this case, or have you heard it discussed by anyone who claimed to know the facts?

(A negative response was received.)

(After submitting the jury as duly qualified to both the plaintiff and the defendant, a jury was finally accepted by both plaintiffs and defendants.)

The Court:

Mr. Clerk, will you swear the jury to try the issue.

(The jury was duly sworn, the oath being administered by Ray Ligon, Deputy Court Clerk.)

The Court:

All right, gentlemen, if you will now state the issues involved in this case, or read me the pleadings so that I may know what it is all about, we will get on with the lawsuit.

(Following a statement of the issues involved, the Court said):

* * * * * * * *

Mr. Brooks:

If the Court please, we would now like to offer in evidence, the deposition of Mr. L. L. Ford, the former Vice-President of Magnolia Soy Products Company, who has accepted a position in Iran, and we had no notice of it. He very unexpectedly left, and so as to not postpone these trials, counsel for all parties entered into a stipulation that I would like to read to Your Honor.

The Court:

Very well.

Mr. Brooks:

It is hereby stipulated by and between the respective parties in the above entitled cause, that the testimony given by the witness L. L. Ford in the trial of that certain cause entitled Frank Ladner, Plaintiff, vs. E. I. Du Pont De Nemours and Company and the Magnolia Soy Products Company, and heard in the Circuit Court of Pearl River County, Mississippi, Case No. 4026, in the same Court, may be entered into the above entitled causes in this cause in the same fashion as if L. L. Ford was present and testified, subject, however, to the following exceptions,

and then there are some four pages of deletions, and those cover rulings of the Court, arguments of counsel over objections, and that comes under those principal headings.

Now counsel in these cases enter into a stipulation today that the exhibit with the Ford testimony both on cross and direct examination may be entered in this case, subject to one objection, that of irrelevancy.

The Court:

Very well. You may proceed.

Mr. Brooks:

I am reading from the original record, at the beginning of page 151.

Mr. Thomas:

We note an objection to any and all notices to and correspondence by and between any officers of the Magnolia Soy Products Company, a corporation, shown to have been formed sometime in January, 1951, and we object to anything had or done on later exchange with any predecessors, or communications with any predecessors, or promotors thereafter, because that is not the acts of the corporation.

Mr. Brooks:

(Reading.)

MR. L. L. FORD, being produced and first duly sworn testified for the Plaintiff, as follows, to-wit:

Direct Examination.

By Mr. Josh Morse:

Q. Please state your name.

A. L. L. Ford.

Q. Where do you live, Mr. Ford?

A. Greenville, Mississippi.

Q. Are you connected in any way with the Magnolia Soy Products Company?

A. Yes, I am.

Q. What position do you hold with that company?

A. Vice President.

Q. How long have you held that position?

A. Since its organization February 7th, 1951.

Q. Were you connected in any manner with the construction or erection of the soybean plant of Magnolia Soy Products Company?

A. Yes, I was connected with it.

Q. When was it built?

A. It was started I believe in June or July, 1950, and was completed about March, 1951.

Q. Who constructed that plant?

A. It was constructed by the partners or stockholders of Magnolia Soy Products Company. We bought the land, the machinery, and other things that went into it and put it together.

Q. After its erection you incorporated it, did you?

A. During the time we applied for incorporation and during the time we were in the process of building it, it was incorporated.

Q. In the construction of this plant, Mr. Ford, did you have any occasion to have any correspondence,

or negotiations, or contacts with the defendant E. I. du Pont De Nemours & Company?

A. I did.

Mr. Thomas:

If the Court please, we object to any and all notices to, and correspondence by and between any predecessors of the Magnolia Soy Products Company, a corporation, shown to have been formed sometime in January of 1951; hence we object to anything had or done on letter exchange with any predecessors or communications with any predecessors or promoters thereof, because that is not the action of the corporation.

Mr. Brooks:

If Your Honor please, this question has come up time, and time again. May we have it settled now with the jury excused?

The Court:

Yes, sir; come back here in chambers. Gentlemen of the jury, you may go out in the hall until we get through. We will call you when this legal matter is settled.

(Whereupon, the Court and counsel retired to the Judge's chambers, and the following proceedings were had.)

The Court:

All right, gentlemen, you may state your position on this matter.

Mr. Brooks:

If the Court please, Magnolia Soy Products Corporation was incorporated on January 3, 1951. Its incorporators were L. L. Ford, J. M. Warren and Lyman Reed.

L. L. Ford Associates, a partnership consisted of L. L. Ford, Lyman Reed and J. M. Warren. Associated with them was the Davidson-Kennedy Company and one Allen Jackson, and a man by the name of Sale.

Now, the incorporators became the stockholders of the corporation, with the exception of a few qualified shares, maybe one per cent. The corporation did not, I understand, approve all of the acts of the incorporators, but the incorporators, in fact, became the officers, and directors, and stockholders of the corporation.

Now, this question, Your Honor, was argued before you, sir, in March of this year, and it resulted from objections to interrogatories filed by the plaintiffs. The objections were filed by the defendant. In that matter the defendant filed ten objections and Your Honor by your order of March 25 of this year, denied nine of the ten objections.

Now the nine dealt with correspondence, telephone conversations and other conversations had by representatives of the defendant with the persons whom I have just named.

The fifth objection was sustained by the Court because that dealt with publication of certain articles

dealing with soybean meal, but they were not issued until after the last acts within the complaint as to the corporation. In other words, I think the first one is dated sometime in July of 1952, and with that exception the Order of the Court of March 25, overruled the objections which were filed on the ground of irrelevancy, and as I stated, dealt with this same problem.

The Court:

All right, Mr. Thomas, what do you have to say as to that?

Mr. Thomas:

If Your Honor please, we stated our position then, and it is just this:

So far as Greenville is concerned, the only connection here with the transaction as regards the death or damage, or deaths or damages, to these Hawaiian cattle, why, the Magnolia Soy Products Company, if the Court please, is a corporate entity which came into being as Mr. Brooks stated in January of 1951, and we think they are going far afield going back to August 11, 1950, which was the question we objected to, and we also object to all like questions, if the Court please, because that would be opening wide the door to parties that are not parties to this cause and who have no connection with The Brode Corporation, Frank Waldron, Limited or with any of the plaintiffs in this case. Hence that would all be incompetent, irrelevant and immaterial, and that is the reason we object to it, if it please the Court.

The Court:

I do not think the objection is well taken, gentlemen. It would seem to me that when a number of parties get together and form a partnership and start in a business, and I am presuming somewhat about what this would be, but they make inquiries of a great corporation as to "how should we proceed", or "by what methods we should take", and that information is furnished to them for that particular matter, and just because of the fact that they incorporated, I do not think changes the principle at all.

The objection would be overruled.

All right, lets go back in the Courtroom.

(Whereupon, all parties returned to the Courtroom, the jury was recalled, and the trial of the case was resumed.)

The Court:

All right, gentlemen, continue reading your deposition.

Mr. Brooks: (Reading.)

"Q. State the first contact had with them in regard to this operation.

A. The first contact with reference to this particular operation was early after we began the planning of it. I don't remember the exact date.

Q. Do you have some correspondence you can refer to in order to refresh your memory?

A. I have a letter here on August 11, 1950, after we had started the building of this plant. I will give you the letter. This was attached to the letter. All of

this was attached to it and so was this. I think that is all that was attached to that letter.

(Deletion.)

Mr. Burgin:
If the Court please, we offer in evidence as an exhibit to plaintiffs' testimony, which we will ask that it be marked Plaintiffs' Exhibit No. 20, a letter from T. J. Milligan, dated August 11, 1950, of the Chlorine Products Division of E. I. Du Pont De Nemours Company, addressed to L. L. Ford, dated August 11, 1950, together with eight enclosures which came with that letter.

The Court:
All right, sir.

Mr. Thomas:
Could we see that, Your Honor?

The Court:
Yes.

Mr. Burgin:
Why, sure, excuse me for not showing it to you.

The Court:
All right, gentlemen, you may proceed.

Mr. Brooks:
May we have that marked as All Plaintiffs' Exhibit to clarify and avoid any misunderstanding?

The Court:
Yes, sir.

Mr. Burgin:

All right, sir, we want that done in all exhibits from now forward.

I would like to explain that some of the information might seem long and detailed, but I think it is very essential.

The Court:

Well, there hasn't been anything short or undetailed so far, and I suppose that is something of the same kind, so go ahead.

(The document above referred to was marked as All Plaintiffs' Exhibit No 20 for identification.)

The Court:

Proceed.

Mr. Burgin:

We would like to have All Plaintiffs' Exhibit No. 20 for identification received in evidence.

The Court:

Very well, sir.

(All Plaintiffs' Exhibit No. 20, the letter from T. J. Milligan, dated August 11, 1950, addressed to L. L. Ford, was marked All Plaintiffs' Exhibit 20 to the testimony of L. L. Ford, and is received in evidence.)

Mr. Burgin:

I would like to call the Court's attention and the jury's attention to some parts of that appendix, which were marked in red, and the word "not" is marked in red in the succeeding passages.

Mr. Thomas:
Bill, you read six million pounds instead of sixty million. Was that not an inadvertence?

Mr. Burgin:
It certainly was. It should have been sixty million pounds of meal.

Also included with that letter are enclosures giving a blueprint plans and designs of machinery which he has described in there, and different essentials of the equipment, charts and graphs and other technical information dealing with the extraction of soybean oil with Tri and included also was a copy of a Stockman's report which was mentioned in the letter from which I would like to read a paragraph or two.

Stockman in this article was describing the effect or disease he found among some cattle that had been feeding tri-extracted oil. I will now read so much of this as pertains to that.

I might state further that the Stockman's Report was published in 1916, and I would like to call your attention to the conclusion of his experiment which he said, "Tri, itself, however, is not poisonous."

Mr. Brooks:
(Reading.)

Q. Let me go into that a little more. I notice that is addressed to L. L. Ford Associates, Eufaula, Alabama; you stated a while ago I believe you had gotten together certain lands and machinery and incorporated it. Was it your statement that the incor-

porators or the people that got this land and machinery together were the same people as the stockholders in the Magnolia Soy Products Company?

A. Yes, this partnership was the partnership of the 3 incorporators of the corporation and they took all of the stock of the corporation.

Q. The people composing the partnership took all of the stock of the corporation?

A. Yes.

(Deletion.)

Letter of T. J. Milligan. August 11, 1950.

First though I want to go into that a little further; how did you obtain these, Mr. Ford?

A. Whoever signed the letter; I think it was T. J. Milligan. That's right, T. J. Milligan—

(Deletion.)

Did all of those instruments come in one letter?

A. Yes, sir; they are listed in the letter.

Q What do those items pertain to?

A. They pertain to the recovery of solvent in the extraction of soybean oil from soybeans with trichloroethylene.

Q. These items which purport to be suggested plans for certain types of machinery; what are they suggested plans for?

A. The machinery, suggested solvent recovery system, and water recovery system.

Q For what plant?

A For the Magnolia Soy Products Company plant.

Letter of T. J. Milligan, August 11, 1950, together with Appendix and all enclosures:

Technical information:

Chlorohydrocarbon Solvents by E. W. McGovern;

Vapor Pressures of Tri-Vegetable Oil Mixtures;

Viscosities of Soybean Oil-Solvent Mixtures;

Heat Transfer Coefficients for Boiling Trichloroethylene and Perchloethylene;

(Deletion to end of page.)

Densities of Soybean Oil-Solvent Mixtures;

Air-Trichlorethylene Psychrometric Chart;

Packing and Gasket Materials Suitable for Use with Tri and Per;

Water Separator for Chlorinated Solvents

Properties of Mentor 28 Scrubbing Oil

A brief discussion of tri-extracted oil and meal—

Enclosing Stockman Report 1916

Cornell University reports

A method for determining residual tri in soybean oil

Schematic piping arrangement of an oil absorption system for recording tri.

(Deletion.)

See preceding page for letter and exhibits to be read to jury.

Q. Did you have any further correspondence with the defendant Du Pont?

A. Prior to that date or afterwards?

Q. After that date regarding any plans, or suggested plans, or specifications, or operational procedures for the Magnolia Soy Products Company, Greenville, Mississippi?

A. I have a letter dated September 29, one October 26, one November 7th, February 13, April 13th, May 8th and April 6th. This is a copy of that one there. This is a copy of that one there.

Q. I hand you here a letter under the letterhead of Du Pont dated September 29, 1950 addressed to L. L. Ford Associates, Eufaula, Alabama; state how you received that letter?

A. It came by mail

Q. Mr. Ford, did you have any additional correspondence with them, or state whether or not you received any bulletins or pamphlets, mimeographed, or otherwise, carrying technical suggestions regarding the operation or construction of the Magnolia Soy Products Company's tri-extraction plant at Greenville, Mississippi?

A. The file I gave you covers the information I had during that period.

Q. Do you have any before that period?

A. I do have but it isn't related to Magnolia.

Q. What does this letter relate to?

A. It relates to certain phases of solvent extraction and meal quality.

Q. You said it didn't refer to the Magnolia plant; which plant does it refer to?

A. I don't think at that time the Magnolia Soy Products Company plant was even projected. I was in the business of building solvent-extraction plants and that was in answer to some of the questions we asked and conversations had regarding the recovery of tri and extraction of tri and the acceptability of the meal on the market.

Q. What is that?

A. A report sent to me by Du Pont.

Q. When was it sent to you?

A. I believe it was sent with that other group. It might be this letter you have in your hand.

Q. Did you receive this Vollersten report after L. L. Ford Associates begun the construction of Magnolia Soy Products Company plant?

A. I think I got this report before then, and also this. I think you are referring to this in that letter here. I'm not sure that is connected.

Q. I now hand you a letter under the letter head of Du Pont dated September 29th, 1950, and addressed to yourself over the signature of T. J. Milligan is that a letter you received from Du Pont through the mails?

A. Yes.

Q. I hand you another letter under the same letter head dated October 26th, 1950, and I will ask if you received that letter from Du Pont through the mails?

A. I did.

Q. I hand you another letter under the same letter head dated November 7, 1950 and addressed to your-

self; did you receive that from Du Pont through the mails?

A. I did.

Letter T. J. Milligan to L. L. Ford, September 29, 1950. Exhibit G.

Letter T. J. Milligan to L. L. Ford, October 26, 1950, Exhibit H.

(Deletion to end of page)

Letter T. J. Milligan to L. L. Ford, November 7, 1950, Exhibit I.

Mr. Burgin:

If the Court please, we offer at this time, a letter under the letterhead of Du Pont dated September 29, 1950, and addressed to L. L. Ford, over the signature of T. J. Milligan. We offer that as All Plaintiffs' Exhibit No. 21.

Mr. Thomas:

We object to that on the same ground, if the Court please.

The Court:

That objection is overruled.

Mr. Burgin:

May we have this marked for identification, and received?

The Court:

Yes, sir.

(The letter above referred to was marked as All Plaintiffs' Exhibit No. 21 to the testimony of L. L. Ford for identification, and is received in evidence.)

Mr. Burgin:

We now offer in evidence at this time, a letter dated October 26, as All Plaintiffs' Exhibit 22, and a letter dated November 7, as All Plaintiffs' Exhibit No. 23.

Mr. Thomas:

To both of which we object for the reasons heretofore shown.

The Court:

Very well, the same ruling.

Mr. Burgin:

At this time, if the Court please, we offer in evidence as all plaintiffs' Exhibit No. 24, a letter to L. L. Ford Associates, Magnolia Soy Products Company, and it is signed by R. Stuart Armstrong of the Chlorine Products Division of Du Pont, dated February 13, 1951, and also as All Plaintiffs' Exhibit No. 25 and the letter together with the enclosures from R. Stuart Armstrong, to James M. Warren, dated April 6, 1951, of Magnolia Soy Products Company, and the letter of R. Stuart Armstrong to Lyman Reed of Magnolia Soy Products Company dated April 13, 1951, and as All Plaintiffs' Exhibit No. 26, and a letter from the same gentleman to Mr. L. L. Ford dated May 8, 1951, as All Plaintiffs' Exhibit No. 27.

The Court:

Al. right, sir. Let them be marked for identification and received.

(Thereupon, the letters above referred to were marked as All Plaintiffs' Exhibits 22 through 27, to the testimony of L. L. Ford, and are received in evidence.)

Letter, R. Stuart Armstrong to L. L. Ford, February 13, 1951, Exhibit G-1

Letter R. Stuart Armstrong to James M. Warren, April 6, 1951, Exhibit G-2

Letter, R. Stuart Armstrong to Lyman Reed, April 13, 1951, Exhibit G-3

Letter R. Stuart Armstrong to L. L. Ford, May 8, 1951, Exhibit G-4

(Note: du Pont stipulated that all of the last-mentioned letters were sent by du Pont to the addressee subject to defendant's objections.)

(Entire Page Deleted.)

Mr. Burgin:

At this point, Your Honor, we also offer in evidence as All Plaintiffs' Exhibit No. 28, a letter addressed to Lyman Reed, L. L. Ford Associates, signed T. J. Milligan of the Chlorine Division of the Defendant Du Pont, dated October 21, 1949, and enclosing a copy of what is referred to as the Vollerston Report in the testimony about feeding experiments with tri-extract soybean meal. That is also a mimeographed document dated May 27, 1949, and entitled "Tri Soybean Extract." We offer that as All Plaintiffs' Exhibit No. 28

Mr. Thomas:

To all of which we object for the reasons previously stated, principally to any offer prior to the formation of Magnolia Products Corporation.

The Court:

I understand the grounds of your objection, and the objection is overruled.

(Whereupon, the documents above referred to were marked as All Plaintiffs' Exhibit No. 28, to the testimony of L. L. Ford, for identification, and are received in evidence.)

Mr. Burgin:

We would also like for the record to show, if the Court please, that insofar as All Plaintiffs' Exhibits Nos. 24, 25, 26, 27, 28 are concerned, counsel for the defendant has stipulated that all of those letters were sent by Du Pont to the addressee named therein, through the United States Mails, and that they might be introduced or offered subject to such objections as might be make to the relevancy of the material or the matters contained therein.

Mr. Thomas:

And to objections which we heretofore have made

Mr. Burgin:

That is right, sir.

May it please the Court, again I apologize for going into these long matters, but we think that they are very vital.

The Court

Go right ahead

Mr. Burgin:
I'll try to make them as quick as I can for the benefit of the Court and the Jury and all of the counsel.

Mimeographed Bulletin, Dated December 27, 1949, Exhibit G-6

(Note: du Pont stipulated this bulletin was sent by Du Pont to L. L. Ford Associates and by them received, subject to defendant's objections.)

Mr. Burgin:
We would like at this time, if Your Honor please, to refer again to this letter of October 21, 1949, in which is enclosed a copy of a report on animal feed deaths, and attached to that, the so-called Vollersten Report, that's written by Dr. V. H. Vollersten. He was an employee of Du Pont, and on page 2, he describes the results of experiments with Tri feed meal, beginning on July 17.

Mr. Thomas:
We object to the comment of counsel.

Mr. Burgin:
I didn't intend to make any comment.

The Court:
Go ahead.

(Whereupon, the letter was read.)

Mr. Burgin:
The second paragraph is just simply a summary, and also included with this exhibit was an article

dated December 27, 1949, which I shall read to the jury.

The Court:

Now, gentlemen, I think it is quitting time. Court is now in recess until 9:00 o'clock tomorrow morning.

(Whereupon, the Court adjourned at 5:00 o'clock p.m., on Friday, November 25, 1956, until 9:00 o'clock Saturday morning, November 26, 1956.)

Proceedings.

The Court:

All right, gentlemen, you may proceed.

Mr. Burgin:

May it please the Court, we are continuing this morning with the direct examination of Mr. L. L. Ford.

(Reading.)

(Deletion—1 2 page.)

Q. Mr. Ford, did you ever have an occasion to discuss with any agent of Du Pont the question of the toxicity of tri extracted soybean meal?

A. I did.

Q. Do you recall the approximate date of that conversation?

A. I believe it was along about the 8th of August, 1950, we had an occasion to discuss it.

Q. Do you recall who was present?

A. Present in the discussion was Mr. Milligan of Du Pont Corporation, Mr. Warren, a partner of L. L. Ford Associates, and myself.

Q. What was said with reference to the toxic condition of soybean meal which had the oil extracted from it by the trichloroethylene process?

(Deletion to end of page.)

Mr. Thomas:

On the last question on 160. We object to that last question on the ground that it occurred prior to the formation of the corporation.

The Court:

That objection would be overruled.

(Reading of deposition continued.)

(Deletion.)

Q. Who was the representative you spoke of?

A. T. J. Milligan.

Q. What position did he hold with Du Pont, if you know?

A. At that time he was connected with the chemical department, but I don't know whether it was as sales representative, or sales engineer. I really don't know his official capacity, he never gave it.

Q. But he was with the Chlorine Products Division of Du Pont Corporation?

A. That's right.

Q. What, if anything, was said between yourself and Mr. Milligan on this occasion?

(Deletion to end of page.)

Mr. Thomas:

If the Court please, we object to the last question on this page, for the same reason.

I withdraw that. There is no objection to that question.

(Reading continued.)

(Deletion.)

Q. Getting down to the occasion I asked you about, Mr. Ford what did Mr. Warren say to Mr. Milligan?

A. He let me do the talking. He asked me about it and we said we would call Mr. Milligan. I said I would call Mr. Milligan in and discuss it with him now and we did. I asked Mr. Milligan about these rumors and things I had heard and those Mr. Warren had heard too, and he said it was all just rumors and there was nothing to it. I asked him point blank to write me a letter to that effect.

Q. Did you receive such a letter?

A. I did.

Q. The letter you have already read to the Court and the jury dated August 11, 1950, state whether that is the letter you received in response to your request.?

A. Yes, in part. It had another part attached and you have taken it off, but that is the letter with the appendix stapled to it.

Q. Why was Mr. Milligan in Greenville at that time, if you know?

A. At that time we had barely begun the construction of our plant, and they were interested in it because we were going to use trichloroethylene. The real reason for his visit at that time, if I remember correctly, he was on his vacation and on his way

back to Delaware and stopped by and it wasn't a visit he made directly.

Q. Why did he stop by to see you?

A. Because we were interested in the use of tri as solvent extraction agent and we had previous conversations with reference to it.

Q. Did Du Pont Corporation ever send any representative to Greenville, Mississippi, to inspect or make any suggestions as to the operation or construction of the Magnolia Soy Products Company's plant?

A. They did.

Q. Who did they send?

A. Mr. Milligan was there on several occasions. Mr. R. Stuart Armstrong was there quite a few times, and Mr. F. G. Loweron one occasion; there was a man named Hamilton there on one or two occasions; there was a man named Schwartz there on one or two occasions to observe.

I don't think he offered any information or anything else—

I think he was just an observer.

Q. Did those representatives of Du Pont make any suggestions to you as to the construction or operation of the plant?

A. They did.

Q. Were those suggestions carried out by you?

A. As near as possible directly to the letter.

Q. I notice in the letter dated August 11, 1950, reference is made by Mr. Milligan as follows: "Copies of the enclosed technical bulletins and charts were sent to Allen Jackson at the Davidson-Kennedy Company with the supposition that you would see them shortly after receipt." Who was Allen Jackson and the Davidson-Kennedy Company, Mr. Ford?

A. That Company manufactured machinery and Allen Jackson was an engineer employed by them, and on occasions he did work for me privately.

Q. Why did they send it to him?

A. I kept my office in Atlanta until about a month before that time, and on occasions before that time I had seen Mr. Milligan in Atlanta and he thought I kept my office there permanently which I did not.

Q. Was Davidson-Kennedy Company doing any work on the construction of the Magnolia Soy Products Company's plant at Greenville?

A. At that time they were, yes.

Q. Were those bulletins sent to them, and these suggested plans and specifications to aid them in the design and construction of this machinery?

A. That is what they were for.

Q. Do you know whether or not Davidson-Kennedy Company carried out the suggestions and recommendations—

A. I didn't understand you.

Q. Do you know whether Davidson-Kennedy Company carried out the suggestions and recommended procedures in this letter of August 11, and other letters?

A. I do know they did.

Q. Throughout your operation, the operation of the Magnolia Soy Products Company plant at Greenville, did you use any other extraction method other than trichloroethylene?

A. At Greenville?

Q. Yes.

A. After January, 1952 we did.

Q. What about prior to November 1, 1951?

A. No, sir.

Q. When this Atchison, Topeka, and Santa Fe car number 20530 was sent?

A. No, sir.

Q. Did you purchase trichloroethylene from anybody other than Du Pont Company?

A. No, sir.

(Page 164.)

Mr. Burgin:

We might call the attention of the Court to the fact that that might possibly be deleted on this page, because that was referring to a case about which the witness was testifying at that time that had no connection with these cases. Now that was question 2 from the bottom of the page.

The Court:

All right, sir.

(Reading of testimony continued.)

Q. Did all of the trichloroethylene you purchased for the operation of your Greenville plant come from the defendant, Du Pont Company?

A. Yes.

Q. And in the space of that period did you follow the suggested procedures outlined in those letters made by defendant Du Pont for the operation of that plant?

A. Yes, sir.

Q. Did Du Pont ever make any suggestions as how to improve the operation of your plant for increased efficiency or increased quality of meal?

A. They did from time to time, by letter.

Q. Did they send any representatives to make oral suggestions?

A. They were there, yes, sir.
Q. They did?
A. Yes.
Q. Were those suggestions carried out by Magnolia Soy Products Company?
A. They were.

(Deletion.)

Mr. Thomas:

Page 165, the last question, "Were those suggestions carried out by Magnolia Soy Products Company", Answer, "They were". We object to that as leading, Your Honor.

The Court:

Well, I don't think that is leading. The objection is overruled.

Mr. Burgin:

At this point, if Your Honor please, we would like to offer in evidence to the testimony of this witness, invoices and drafts in payment thereof, covering shipping of Tri made by the defendant Du Pont Company to the Magnolia Soy Products Company.

We offer in evidence as All Plaintiffs' Exhibit No. 29, Invoice No. 2039 from Du Pont Company to Magnolia Soy Products Company, covering 60 drums of extraction grade Tri at a charge of $4,290.00 together with drafts attached on Magnolia Soy Products in payment thereof, dated February 14, 1951.

We will offer all of these for identification, if the Court please, and then ask that they be received at one time.

The Court:
Very well, that will probably save some time.

Mr. Burgin:
We offer as All Plaintiffs' Exhibit No. 39, invoice dated February 23, 1951, for 33 drums of extraction grade Tri, sold by Du Pont to Magnolia Soy Products Company for the sum of $2358.50, together with draft attached in payment therefor.

(The invoices above referred to were marked as All Plaintiffs' Exhibits Nos. 29 and 30, for identification, to the testimony of the Witness Ford, and are received in evidence.)

Mr. Burgin:
We offer as All Plaintiffs' Exhibit No. 31, invoice dated March 19, 1951 from Du Pont to Magnolia Soy Products for 60 drums extraction grade Tri for the sum of $4290.00, together with draft in payment thereof.

We offer as All Plaintiffs' Exhibit No. 32, invoice dated April 19, 1951, between the same parties, likewise for 60 drums of extraction grade Tri for the sum of $4290.00, together with draft in payment therefor.

We offer as All Plaintiffs' Exhibit No. 33, invoice dated May 23, 1951, between the same parties for 55 drums extraction grade Tri, for the sum of $3932.50, together with draft in payment thereof.

(The documents above referred to were marked as All Plaintiffs' Exhibits 31, 32, and 33, to the testimony of the Witness Ford for identification, and are received in evidence.)

Mr. Burgin:

We offer in evidence at this time, All Plaintiffs' Exhibit No. 34, invoice between the same parties for 52 drums of extraction grade Tri, dated November 21, 1951, for the sum of $3718.00, together with draft in payment therefor.

(Whereupon, the invoice above referred to was marked as All Plaintiffs' Exhibit No. 34, to the testimony of the Witness Ford, for identification, and was received in evidence.)

(Reading of testimony continued.)

Q. After July 31, 1951, did you purchase from Du Pont Company any solvent to be used for extracting oil from soybeans?

A. Yes, on November 21 I got a shipment. I mean a shipment was made then.

(Deletion to end of page.)

Invoice	Date	Exhibit
2039	2-14-51	G-7
14195	11-21-51	G-8
2447	2-23-51	G-9
3648	3-19-51	G-10
5215	4-19-51	G-11
6866	5-23-51	G-12

(Note: du Pont stipulated that tri-extraction grade was sent by Du Pont to and received by Magnolia as per invoice.)

(Deletion.)

Q. Would you state the procedure which the Magnolia Soy Products Company made regarding the analysis for safety or any other analysis the Magnolia Soy Products Company made of the soybean meal which it shipped?

A. We tested the meal periodically and we tested every carload we shipped.

Q. State whether or not you tested Atchison, Topeka, Santa Fe car number 30530?

A. If we shipped that car we tested it.

Q. Is that a copy of the analysis report on that car?

A. It is.

Q. Now was that analysis report received by the Magnolia Soy Products Company?

A. We draw a sample after the car is loaded. We use an instrument and draw out about one teaspoonfull from each bag and mix it together and then draw a representative sample of that and mail it to the laboratory and they analyze it and return a written report to us showing the oil residue, the moisture and protein content. I believe that's right . . . the moisture, oil or fat, and protein and in the case of soybean meal they analyzed it for urease activity.

Q. What is the significance of that?

A. Urease analysis?

Q. Yes.

A. I don't know enough about, but there is some natural element in the soybean by cooking it over a period of time at a certain temperature it will reactivate to urease.

Q. Was the test for urease and the other tests suggested to Magnolia Products Company by anybody?

A. That is the usual procedure and it wouldn't necessarily have to be suggested.

Q. How do you know it was the usual procedure?

A. Because of experience in the business we call for an analysis of every carload.

Q. Do you know what temperature a negative urease report indicates the soybean meal was processed at?

A. The soybean meal was processed at—

(Deletion.)

Q. I will restate my question. Do you know at what temperature soybean meal was cooked at the Magnolia Soy Products Company plant?

A. Yes.

Q. At what temperature was it cooked?

A. 245 degrees Fahrenheit.

Q. Do you know the Centigrade equivalent?

A. I don't know but it would be about 118, 120 or 121—somewhere about that. About 121 I believe is right.

Q. Do you know for what period of time each batch of soybean meal was cooked at this temperature?

A. It was brought to that temperature and maintained there forty minutes or longer.

Q. Why did you maintain it at that temperature that long?

A. It took it an hour to go through this vessel that cooked the meal. However, it comes to its temperature the first twenty minutes and then it is just a matter of holding it there until it goes out of that vessel. It takes it an hour to go through the vessel.

Report of analysis, Woodson-Tenent Laboratories, dated November 3, 1951, Exhibit G-13, relating to Thigpen shipment.

(Deletion to end of page.)

(Deletion.)

Q. I now hand you a letter dated July 31, 1951 under the letter head of Du Pont Company and purporting to be signed by C. B. Shepherd, Manager Chlorine Products Division of E. I. Du Pont De Nemours & Company; did you receive that letter from the Du Pont Company?

A. Yes.

Q. Is that the original of the letter you received?

A. Yes.

Q. I notice that letter appears not to have been folded; state whether or not it has been folded?

A. This letter has not been folded. This letter was handed to me by hand and was not mailed.

Q. You say it was handed to you by hand?

A. Yes.

Q. Who handed the letter to you?

A. R. Stuart Armstrong.

Q. What was the occasion for him bringing the letter to you instead of sending it through the mails, if you know?

A. I don't know.

Q. Do you have that letter with you?

A. Yes.

Q. I wonder if you would recite to the Court and the jury the conversations and meetings you had with Du Pont representative, or representatives, with reference to the construction and operation of the plant from the time of your first contact with them up until the time you received this letter.

A I gave you all of my file yesterday and I would like to have those letters so I could refer to them for dates and so forth.

During 1949 and for several years before that time I was engaged in the business of building solvent extraction machinery and selling it. All the machinery I dealt in—all the solvent extraction equipment . . . was to use a petroleum product known as Hexane which is very volatile. The people I did business with and sold machinery to began to inquire about a non-explosive solvent that was appearing periodically in the trade journals; the process developed at Iowa State College . . . (deletion to end of page.)

(Deletion—1 line.)

A. I wrote Iowa State College for information about this chemical they were using which they called trichloroethylene and they in turn referred me to Du Pont Company, and I wrote to Du Pont asking them to send me information about trichloroethylene. Sometime during that year, or the early part of 1950, I met with Mr. T. J. Milligan of the Du Pont Company and at that time Mr. Milligan told me. . .

(Deletion.)

A. Mr. Milligan told me at that time the Du Pont Company was interested in larger mills; they had concentrated on small mills a farmer could buy and set up on his farm and they were interested in developing a larger mill. I was interested in selling mills but my experience with hexane was the recovery of hexane was 12 or 15 pounds per ton of your material process which was not excessive for that type solvent.

At any rate, in my conversation with Mr. Milligan he assured me that it would be possible to get the solvent disappears down to as much as three-tenths of one per cent and we finally proved that to be true. I set about to try to reconcile my way of thinking with the use of trichloroethylene, and during this time I had two or three contacts with Mr. Milligan. I can give you the dates later. Mr. Milligan told me that if I built a mill that would use trichloroethylene that the Du Pont Company would furnish me any assistance in engineering, developing, and designing possible for them to offer me and they did. They furnished me with that assistance. Mr. Milligan paid me a visit on at least two occasions in Atlanta. I had headquarters there at that time. He was down at Greenville, Mississippi on or about August 8th, 1950.

I had some correspondence, which I have here, from Mr. Milligan following that meeting, and I would like to call your attention to it.

I have a letter here dated August 11, 1950 from the E. I. Du Pont De Nemours & Company and signed T. J. Milligan of the Chlorine Products Division and he told me in this letter: "Therefore, in our mutual interest, you can be certain that we will do everything we can to help make your Greenville plant a success."

In the meantime we had projected this Greenville plant.

Reading further: Additional technical information on the—

—At any rate they sent me these bulletins Chlorohydrocarbon Solvents, Vapor Pressures of Tri-Vegetable Oil Miscutes, Viscosities of Soybean Oil-Solvent Mixtures, Heat Transfer Coefficients for Boiling Trichloroethylene and Perchlorethylene, Densites of Soybean Oil-Solve Mixtures, Air-Tri Psychrometric Chart, Packing and Gasket Materials Suitable for Use with Tri and Per, A Method for Determining Residual Tri in Soybean Oil, Water Separator for Chlorinated Solvents, and Properties of Mentor 28 Scrubbing Oil.

That is the drawing right there of Water Separators for Chlorinated Solvents. We finally used that drawing in designing our water separator and used the dimensions given in it.

Later, in 1950, I had a letter from Du Pont from Mr. Milligan and signed by him . . . I don't see it right now . . . that he had been transferred to another operation of the Du Pont Company and Mr. F. G. Low would take over the work he was doing, or somebody in Mr. Low's department. I believe Mr. Low was the department head but I'm not sure about that.

On January 11th, 1950 Mr. Low came to our plant. At that time and before that time we had from time to time consulted Du Pont and had had information from them regarding the sizes of the vessels. They had seen every drawing and diagram of all the sizes of all vessels and they had approved it.

On November 7th, 1950 I had a letter from Du Pont signed T. J. Milligan of the Chlorine Products Division. I have it here and it has not been read.

(Deletion.)

Letter, November 7, 1950, T. J. Milligan to L. L. Ford, Exhibit I, already introduced ante, page 157, read to jury.

Letter, October 26, 1950, T. J. Milligan to L. L. Ford, Exhibit H, introduced ante page 156, read to jury.

Letter, September 29, 1950, T. J. Milligan to Ford*

I would like to read a paragraph from this letter dated September 29, 1950 which I received from Du Pont signed T. J. Milligan:

"Several trichloroethylene extraction plants are constructed so that the boiler and extraction plant are virtually in the same room, although in one or two locations, there is a thin, sheet metal partition between the two. It appears to us that the chief danger of fire and explosion is from dust produced by the meal preparation equipment, and therefore, some protective measures must be taken to insure that the dust produced during the preparation of the flakes is not allowed to collect in the boiler room so it will be exposed to open flame. The dust hazard will probably be the major consideration of the insurance companies when determining the insurance rates for trichloroethylene extraction plants. If at any time an insurance company desires information on the flammability rating of trichlorothylene, we would greatly appreciate your getting in touch with us and we will gladly furnish them the necessary data."

*Exhibit G, already introduced ante page 157.

On January 11th, 1950 Mr. Fred Low came to our plant and with him was Mr. R. Stuart Armstrong. Mr. Armstrong remained for two or three days while Mr. Low spent only a few minutes after introducing Mr. Armstrong and telling us the purpose of his visit which was to assist us and help us . . . then he went on his way. From February 23 to March 4th Mr. Armstrong was in our mill instructing the operators and mechanics erecting the machinery, and then he was back in our plant on March 7th through March 9th, and then he was back on March 17th, 1951, and that was about the time we started the operation of our plant.

There was a Mr. Hamilton connected with Du Pont who came to our plant about March 17th. I believe it was March 16th, he came to the plant and was there March 17th. During that period our plant finished the usual season's crush and closed down in the early spring . . . April or May. We didn't operate over 90 days that season. The next visit we had from any of Du Pont's men was on the 2nd of August, 1951, or about that time, and on that day Mr. Armstrong came to our office and brought a letter and gave the letter to Mr. Reed, who was one of the officers of the Company, and Mr. Reed read it and passed it across the table to me. I read the letter and became very much disturbed. I told Mr. Armstrong, "here you've let us spend $500,000.00 building this mill and now you tell us we can't use it to manufacture feed", and he said, "the reason I brought it personally was because I didn't want you to get excited about it." I told him, "90 percent of our business is cattle feed and we can't sell a car a year other than for cattle feed and now you tell us not to sell

any more for cattle feed", and he said, "I didn't say that," and I said—

(Deletion to end of page.)

Mr. Thomas:

If the Court please, we move to strike the recorded answer on the last line, where the witness says, 'I didn't say that,", and I said—', as an attempt to vary the terms of the letter of Mr. Armstrong, and no predicate has been laid on the part of Mr. Armstrong to retract anything from this letter.

The Court:

Go ahead. Let the question be answered under a reservation which I may change later. I've got to get the picture more clearly.

(Deletion.)

A. All right, go ahead, Mr. Ford.

A. Mr. Armstrong flew in there and Mr. Reed met him at the airport. He delivered this letter and discussed it very briefly and then he got on the plane and left and went back to Wilmington, Delaware. Anyway, I asked him, "does the Du Pont Company know we can't operate our mill and have built one here that cost $500,000.00? If we can't sell it for cattle feed we can't operate it. Did Du Pont tell us to shut it down? Do they have evidence?" and he said, "No, there isn't any evidence conclusive; there's rumors circulated from time to time." All through these letters they dispelled those rumors and said there wasn't anything to them. I will read this letter to you. . .

(Deletion.)

Mr. Thomas:

We object to that on the same grounds that we made to the previous question, and move to strike for the reasons previously stated.

The Court:

Well, the same ruling.

Mr. Burgin:

At this time, we offer in evidence as All Plaintiffs' Exhibit No. 35, a letter from C. B. Shepherd, Manager, Chlorine Products Division, E. I. Du Pont De Nemours and Company, addressed to Mr. Lyman Reed, Sales Manager, Magnolia Soy Products Company, Greenville, Mississippi, dated July 31, 1951.

The Court:

Very well, let it be marked for identification and received in evidence.

(The letter referred to, signed by C. B. Shepherd, addressed to Lyman Reed, was marked as All Plaintiffs' Exhibit No. 35 to testimony of the Witness Ford for identification, and was received in evidence.)

(Reading of testimony continued.)

(Ford read the following from first paragraph of letter, July 31, 1951, from Shepherd to Lyman Reed, Exhibit G-21, later introduced by defendant, pages 243, 244):

A. "In recent months there have been increasing indications that trichloroethylene-extracted soybean meal may be associated with a hemorrhagic disease

in cattle which has been observed in widely scattered areas. Research programs are now being undertaken by the University of Minnesota and Iowa State College to investigate the nature and causes of the disease and to determine if trichloroethylene-extracted meal is, in fact, a contributory factor."

(Deletion.)

A. "The cause of the disease is unknown. The evidence that trichloroethylene-extracted meal is associated in any way with the disease is entirely circumstantial, but the most recent reports have all come from farms using this type of meal in their cattle feed. Thus, despite the satisfactory experience with trichloroethylene-extracted meal in the past, we cannot ignore the possibility that this meal under certain conditions, perhaps in combination with one or more other factors, may be associated with the particular hemorrhagic disease observed in Minnesota and other scattered points.

In view of the present uncertainty, we strongly recommend that sales of trichlrooethylene-extracted meal be confined to outlets other than cattle feed until more definite information is available from the investigation now underway in Minnesota and Iowa. To the best of our knowledge, the hemorrhagic disease in question is peculiar to cattle only, and all the available evidence and experience indicates that trichloroethylene-extracted meal is entirely satisfactory as a component for feeding hogs and poultry."

We took the position they knew what they were talking about. We had the mill closed down at the

moment and later in the year we ordered from the Du Pont Company a shipment of trichloroethylene to extract oil from soybeans to be used for cow feed. I told Mr. Armstrong that we couldn't operate unless we did sell it for cow feed, and he knew it was going to be used for that. I will give you the date. November 21, 1951 the Du Pont Company drew a draft on my Company for $3718.00 for 52 drums, 650 pounds each, 33800 pounds net, trichloroethylene Extraction Grade, 11 cents a pound FOB Plant, Niagara Falls, New York, drums included. They didn't anywhere on this invoice, or accompanying letter in any way say this could not be used as they recommended it all of the time through the years past.

In January, 1952 Mr. Chadwick called me over the telephone and asked what kind of solvent we used and I told him tri—

(Deletion—2 lines.)

Q. As a result of that call what did you do?

A. We shut the mill down within an hour and a half. I heard from this source that—

Q. You did shut the mill down?

A. Yes.

Q. Have you ever reopened it, Mr. Ford?

A. No, sir.

Q. Have you sold any more meal?

A. I made 33 tons in the process of cleaning up the mill and I still have some of it. I offered it for chicken and hog feed and couldn't sell it and I still have it.

(Deletion.)

A. Do you want me to tell why my mill is shut down?

(Deletion to end of page.)

Q. At the time of this conversation you told the jury about when this letter of July 31st was delivered to you by Mr. Armstrong, did Mr. Armstrong express any opinion on the part of Du Pont as to the safety of the process when used for cattle feed?

A. The letter was dated July 31st but it is my recollection he brought this letter to our office about August 2nd; it was sometime after it was written.

Q. Did he express any opinion as to the safety of the process when used as cattle feed at that time?

A. He—

Q. —or when used for cattle feed.

A. He expressed the opinion so far as he knew there wasn't any evidence that trichloroethylene-extracted meal had anything to do with cattle losses.

Q. When you told him you couldn't operate your plant, without selling your feed for cattle food, what did he say to you at that time?

Mr. Thomas:

We move to strike the answer for the reasons above given, that is, it is simply an attempt to detract from the letter heretofore mentioned.

The Court:

All right, sir, the same ruling.

Mr. Thomas:

If the Court please, we would also like to note the same objection to the question just above that, which

was, "Did he express any opinion as to the safety of the process when used as cattle feed at that time?"

The Court:

Very well, sir, and of course, I'll make the same ruling.

(Reading of testimony continued.)

A. I asked him point blank if Du Pont would recommend our closing the plant down because we couldn't sell it for cow feed and he said they did not.

(Deletion to end of page.)

(Deletion.)

Q. Well, state whether or not you received any warning from the Du Pont Company concerning the sale of your meal for cattle food after the date this letter was delivered to you by Mr. Armstrong?

A. I did not receive any warning from the Du Pont Company, but I received a warning from the State Plant Board on January 10th, 1952.

Q. Particularly in the month of October and November, 1951, state whether or not you received at that time any warning from the Du Pont Company as to any toxic effect tri-extracted meal might have on cattle?

A. I did not.

Q. Yesterday we were talking about the cooking process in your mill and you said it took one to one and a half hours for this meal to go through what?

A. The DT, the Desolventizer Toaster.

Q. I'll just call it toaster. How is that constructed?

A. It is constructed of vats stacked on each other. These vats are 85 inches in diameter and 30 inches deep and inside they have a stirring arm and they are jacketed inside with steam at the bottom and sides. The meals come in at the top and it is let down in gates to the bottom and it then comes from the bottom to the meal coolers.

Q. How many vats in this toaster?

A. Six.

Q. How long would it take if you were to run one sack of meal through this thing? Suppose one sack entered that top vat, how long would it take for it to come out at the bottom vat?

A. How about an hour and a half.

Q. How long approximately would it be in each of the 6 vats?

A. Between 15 and 20 minutes in each vat.

Q. Would it stay in each vat the same length of time?

A. Yes, the vats stay full all of the time and we draw it off of the bottom. Or we did when we operated.

Q. And would it stay in each vat the same length of time?

A. Yes.

Q. What is the temperature of the top vat?

A. The temperature of the meal as it went in was 118 to 120 degrees Fahrenheit and it reached a temperature of 180 degrees in that top vat before going in the next one.

Q. When it went into the second vat what temperature was reached in that one?

A. Just below the boiling point of water, 210 degrees.

Q. What about the third one?

A. It reached 230 degrees in the third vat.

Q. What about the 4th one?

A. It reached 255 degrees in the 4th vat.

Q. When it went from the 4th vat to the 5th vat what temperature was reached there?

A. We maintained that temperature in the 5th vat, 255 degrees.

Q. What temperature was it when it went from the 5th vat to the 6th vat?

A. It was maintained at 255 degrees.

Q. In the 6th vat?

A. Yes.

Q. And from there it came out where?

A. Out of the vessel. As the vessel filled at the top it had mechanical works so that the bottom would open and a certain amount would come out, maintaining the same level in the machine all of the time.

Q. You said something yesterday about a letter you received dated August 11, 1950 . . . or rather you received it on that date . . . and you read portions of it today; tell the Court a[illegible] the Jury the occasion that preceded this letter th[illegible] was the cause of its being delivered to you, if any?

This is the letter here dated August 11, 1950 and I notice this, referring to the second paragraph on page 2: "Several times you have mentioned that certain parties in the South are conducting a "smear campaign" maligning the quality of tri-extracted soybean meal and oil and casting doubts on the stability of trichloroethylene." Did you have a conversation with Mr. Milligan that he had reference to?

A. Yes.

Q. What was that conversation?

Mr. Thomas:

If the Court please, Counsel has just read the question, "What was that conversation", and we object to that on the same ground that it is an attempt to vary the terms of the letter.

The Court:

Well, the same ruling.

Mr. Thomas:

And if the Court please, we object further on the ground that because it was prior to the formation of the corporation.

The Court:

All right, sir, that objection is overruled, too.

(Reading continued.)

(Deletion.)

Q. Just tell what you told Mr. Milligan.

A. We brought Mr. Milligan into our improvised office at that time and I told him what we had heard and asked what about it. I told him that we were at a point at the time to where we could back up, that we had not gone so far that we couldn't convert. He told us there wasn't anything to the rumors we'd heard and I asked him to give me a letter to that effect.

Q. What were the rumors you heard?

(Deletion.)

Q. What did he tell Mr. Milligan he had heard?

A. I was the man carrying the run of the conversation. He didn't know trichloroethylene from anything else. I don't suppose he could even pronounce it. I was carrying the conversation so he would be satisfied in his mind about it because he was putting a lot of money into this thing as well as myself.

Mr. Burgin:

On page 184, for the information of the Court and the jury, so that they may understand what the answer means, why I would like to say that Mr. Ford at that time was referring to his partner and business associate, Mr. Warren, who subsequently became president of Magnolia Soy Products Company.

The Court:

Yes, sir, I understand that, and as I understand, the man didn't know anything about chemistry, and couldn't even pronounce trichloroethylene, and I can't pronounce it myself.

(Reading continued.)

Q. What did you tell Mr. Milligan?

A. I told him what had been said about it and Mr. Milligar. told me it was all rumors and there was nothing to it.

Q. Nothing to what?

A. Nothing to any information we had that soybean meal made with trichloroethylene was toxic, that it was strictly rumors and there was nothing to it. He said they had investigated it and offered this product in some of their trade papers and they would not recommend it unless it was all right. I asked him for a letter to that effect and alor.g with those other things he wrote this letter.

Q. Was there an appendix attached to this letter?
A. Yes, there was.
Q. Will you read a portion of that appendix to which you have referred to the jury:

Mr. Burgin:
On page 185, at this point, the witness quotes from an appendix from the letter of August 11, 1950, which we read to the jury yesterday afternoon, and with permission of the Court and counsel, we will skip the reading as being repetition.

The Court:
I remember it, and I think the jury does too, what it said.

(A. "Appendix. Letter to: L. L. Ford, Dated: August 11, 1950.

Meal
The use of trichloroethylene for extraction of oil-bearing seeds was initiated commercially in Germany and England before the first World War. In 1913-1916, some of the cattle being fed tri-extracted meal in Scotland died of a previously underscribed hemorrhagic disease.
A study of the disease is reviewed in the Stockman Report issued in 1916, a copy of which is enclosed. Several passages are marked in red to call them to your attention. Many people who have read Stockman's Report in a cursory manner, or who have heard the story second or third-hand, believe that Stockman actually showed that trichloroethylene itself was not the poisonous substance affecting the cattle. A malady similar to that described by Stock-

man appeared in several herds of cattle in the Duren area of Germany, in the early 1920's. Investigations made at that time did not definitely establish whether all the affected animals had been fed Tri-extracted meal. In some cases, however, there was evidence that Tri-extracted meal had been included in the diet. Several extensive investigations failed to reveal the cause of the disorder.

In the 1930's, when solvent extraction was in its infancy in this country, Du Pont financed experimental feeding tests with Tri-extracted and methylene chloride-extracted meals at Cornell University. Copies of the reports covering this work are enclosed. On the basis of the Cornell tests, it was concluded that good quality soybean meal can be produced by extraction of soybeans with tri and several small commercial soybean extraction plants using tri were installed between 1940-1950. Complying with the Cornell findings, these plants were designed to produce meal which had been heated to 120°C. for 20-30 minutes during or following the meal drying operation. These plants have now produced approximately 60,000,000 pounds of meal which is readily accepted by most feed manufacturers and has been fed with excellent results in several Midwestern states.

It has recently been brought to our attention that an unidentified hemorrhagic cattle disease, having symptoms virtually identical to those described in the Stockman and Cornell reports, has been encountered among cows in both Iowa and Colorado. Feeding practice on the farms where the disease has been encountered was investigated as a possible clue to the cause and, as might be expected, varied widely from farm to farm. Some of the affected animals had been on grass, without supplemental rations, for 45 days

prior to onset of symptons. Others were receiving soybean meal plus hay, with or without supplemental minerals and vitamins added. On farms where soybean meal was employed, some were feeding expeller or hexano-extracted meal, others were feeding trichlorothylene-extracted meal. There is, of course, the possibility that all animals reportedly suffering from this hemorrhagic condition did not actually have the same disease; however, we have been told that the symptoms appear identical.

An important feature of the occurrence of the disease in Iowa and Colorado is the fact in several cases a single meal shipment was divided among a number of farms with the disease occurring on only one. On the farm where the disease occurred, however, several animals were lost. This is one of the chief factors which has led the soybean processors, veterinarians, and university veterinary faculties with whom we have discussed these cases to conclude that the soybean meal was probably not the cause of the disease.

A number of organizations are continuing to study the disease. If anything new is developed, we will let you know. So far as we know, the occurrence of this disease in this country is not widely known.

Four or five years ago several tank cars of inadequately desolventized tri-extracted soybean oil were shipped to a number of vegetable oil processors. The excessive residual tri in the oil "killed" the hydrogenation catalyst during the hardening operation. News of this occurrence quickly spread throughout the extraction and vegetable oil refining industries with the result that the seriousness of the incident was magnified.

In 1948, Dr. Norris of Swift & Company presented a paper entitled "The Effect of Trichloroethylene in the Hydrogenation of Soybean and Cottonseed Oils" before the American Chemists' Society. He found that soybean or cottonseed oils containing less than 0.01% of tri can be hydrogenated without damage to the catalyst. The evidence presented by Dr. Norris, plus the fact that several major vegetable oil processors have since confirmed the results of his tests, has demonstrated that properly processed soybean oil extracted with trichloroethylene is equal in every respect to that extracted with hexane.

Approximately 14,000,000 pounds of tri-extracted soybean oil has been produced in this country to date. We understand the oil is marketed under the same trading rules as hexane-extracted oil and sells at the going market price. In order to insure that quality of tri-extracted oil remains unquestioned, we are strongly recommending that oil desolventizing equipment be designed to produce oil containing less than 0.005% of trichloroethylene. Also, we are urging that all tri-extraction plant operators analyze the oil before shipment so that no oil containing excessive amounts of tri will be placed on the market."

The rest of that refers to corrosion.)

Mr. Burgin:

We will skip to page 189, if the Court please.

(Reading continued.)

Q. You need not read that. At any time during your correspondence and communications with Du Pont did they ever point out to you the experiments run by Stang?

A. No, sir.
Q. Or those run to Erickmann?
A. No, sir.
Q. Or those run by Lothes?
A. No, sir.
Q. Never at any time?
A. No, sir.
Q. Did they tell you at any time that anyone had clinically introduced, or produced, the identical symptoms which have been described here of these cattle dying?
A. They did not.
Q. State whether or not Magnolia Soy Products Company in the operation of the plant at Greenville, Mississippi, which manufactured soybean meal by the use of tri as a solvent. . .
A. I didn't hear all of your question.
Q. I hadn't finished it. State whether or not Magnolia Soy Products Company in the operation of its plant at Greenville, Mississippi, which manufactured soybean meal by the tri-solvent process, whether in the operation of that plant you followed the directions given you by Du Pont for the operation of your plant?
A. Right to the letter.
Q. You may take the witness.

Cross Exam. By Mr. Thomas:
Q. Mr. Ford, I believe you told the Court and the jury that one of your stockholders knew nothing about trichloroethylene, is that right sir?
A. That's right.
Q. I believe you said he couldn't even pronounce the word?
A. No. He later could I'm sure.

Q. You are the Vice President of the Company, are you not?

A. Yes, I am.

Q. And as a matter of fact they looked to you for the engineering aspect of it, didn't they?

A. Yes, sir.

Q. L. L. Ford Associates, to which you referred in your direct testimony here, I believe had under that heading Engineers and Builders of Solvent Extraction Equipment?

A. That is correct.

Q. Lyman Reed wasn't an engineer, was he?

A. No.

Q. And Mr. J. M. Warren wasn't an engineer either, was he?

A. No, sir.

Q. As a matter of fact Mr. Warren is the man who couldn't originally pronounce the word trichloroethylene, isn't he?

A. That's correct.

Q. As I understand your testimony on yesterday, the incorporators of Magnolia Soy Products Company were identically the same persons who were the parties, or partners, under L. L. Ford Associates?

A. Yes.

Q. I believe you also said on yesterday that it was just . . . well, instead of a different business it was a continuation of the same business.

A. It was not a continuation of the same business. It was incorporated as a process plant to process soybeans.

Q. But the same parties who composed the partnership doing business as L. L. Ford Associates were the same and only incorporators in Magnolia Soy Products Company, is that right?

A. Yes.

Q. And the incorporators and stockholders remained the same throughout the operation until you closed down in January, 1952?

A. Yes.

Q. You had had previous experience before L. L. Ford Associates partnership was formed in connection with building or promoting the sale of solvent-extraction equipment, had you not?

A. Yes.

Q. Weren't you connected with Davidson-Kennedy of Atlanta?

A. I didn't state that.

Q. Well, was that true, or not?

A. No. I never was connected with them only in a way that I bought machinery from them and I let their engineers help me with work, or certain work, I had to do. I was not employed by them and was not a party of that concern.

Q. You are familiar with Mr. Allen Jackson of Davidson-Kennedy, are you?

A. I am.

Q. Weren't you working with him in the sale of solvent-extraction equipment?

A. Yes.

Q. As a matter of fact you were in Atlanta, Georgia, when two visits were made by Mr. Milligan, weren't you?

A. I was there when he was there on two occasions.

Q. This invoice you referred to this morning, being the invoice for the last shipment of tri to Magnolia Soy Products Company, I believe the invoice and sight draft attached to it has been marked and introduced in evidence as Exhibit G-8 to the plaintiff's testimony.

A. I believe so.

Q. That shipment of tri came into Greenville, Mississippi, and you paid the draft November 21, 1951, didn't you?

A. The draft is dated that date, but I don't know what date I paid it.

Q. What does the bill of lading show as the date it was shipped?

A. The way-bill shows it was shipped—this isn't a waybill.

Q. Well, call it the instrument attached to the draft then.

A. 11-21-51.

Q. The invoices introduced in evidence, together with the sight drafts attached thereto, is evidence of the only shipments of tri made by Du Pont to Magnolia Soy Products Company, is that right?

A. I believe that's right. If there is any other I don't remember it.

Q. The last shipment of tri before this shipment evidenced by that sight draft of November 21, 1951, was made in May, 1951—May 23rd, 1951, is that right?

A. Yes.

Q. So that the trichloroethylene that Magnolia Soy Products Company used in extracting the soybean meal that was sold to L. J. Thigpen testified about was trichloroethylene which you had in your possession prior to the last shipment?

Mr. Thomas:

L. J. Thigpen was the Thigpen in the Ladner case, out of which this Ford testimony was taken, which went to the Supreme Court of Mississippi. I would like for that to be in the record.

The Court:
Very well, sir.

Mr. Thomas:
And on down further, if Your Honor please, reference is made to a Mr. Morse. Now Mr. Morse was the attorney referred to in the other suit.

The Court:
Very well, sir.

(Reading continued.)

A. Yes.
Q. I believe it has been shown here by the evidence and by instruments that a carload of meal was received by L. J. Thigpen about November 11, 1951, in Atchinson, Topeka, and Santa Fe car #30530.
A. That's correct. I did have the bill of lading. It was shipped from our plant at Greenville, Mississippi.
Q. You told Mr. Morse you followed to the letter what Du Pont, through the men you have told us about, told you, or any instructions, pamphlets, or letters received from Du Pont?
A. That's right.
Q. Magnolia Soy Products Company looked to you because you were the engineer to read all of that and you did read all of it, didn't you?
A. Yes.
Q. And you did that about the time you got it, did you?
A. During the time, yes.
Q. You, of course, had some pride in your plant, having invested your money in it?
A. Yes.

Q. Therefore you subscribed, or Magnolia Soy Products Company, during the year 1951 to that magazine called Feed Stuffs, didn't you?

A. I don't know that we did.

Q. Will you say that Magnolia Soy Products Company did not receive from February, 1951 that trade journal called Feed Stuffs.

A. I would say that I don't know.

Q. Were you interested in any of the trade journals?

A. Mr. Reed handled the feed sales.

Q. He was Secretary of the Company?

A. Yes.

Q. And you the Vice President?

A. Yes.

Q. And Mr. J. M. Warren was President and Treasurer?

A. Yes.

Q. Mr. Frank McDonald was plant superintendent, was he not?

A. Yes.

Q. Who was your bookkeeper?

A. Mr. McKee.

Q. And that applied during all of your operations in 1951?

A. In all of it in 1951.

Q. But you depended on Mr. Reed to keep up with that aspect of the business?

A. He handled the feed sales.

Q. Tell whether or not Magnolia Soy Products Company in 1951 subscribed to and received a trade journal called Soybean Digest?

A. I think we did subscribe to that.

Q. In your business did Magnolia Soy Products Company belong to the National Soybean Processors Association?

A. No.

Q. You knew of the existence of the Association?

A. Yes.

Q. One of the reasons that made you remember you subscribed to Soybean Digest is because they had a nice write-up about your plant at Greenville and a picture of it too, isn't that right?

A. I never did see it but I heard about it.

Q. I hand you a sheet and at the bottom is noted "Soybean Digest"; state whether the picture shown on there is a picture of Magnolia Soy Products Company's plant at Greenville, Mississippi?

A. Yes.

Q. Read it and see whether that correctly states the facts concerning that plant?

A. "This 100 ton plant operated by Magnolia Soy Products at Greenville, Mississippi, is the largest trichloroethylene solvent plant in the United States. The mill was designed and built by L. L. Ford Associates. The extraction is carried on in a Bollman type extractor. The solvent is removed from the meal and the meal is toasted in a one-unit desolventizer and toaster built especially for this mill by Ford. The 300,000 bushel storage was completed in time for last fall's soybean crop. Test runs were started for the mill about March 1. The mill, which is prdoucing "Magnolia Brand" 44 per cent soybean oil meal, is under the acting management of Lyman Reed. Frank McDonald, the plant superintendent, was formerly with Delta Products Company at Wilson, Arkansas."

Q. That correctly sets forth the facts pertaining to your plant, doesn't it?

A. That sets forth the facts except this toaster was not built especially for this particular mill. It was a standard item of equipment.

Q. The same as used by Crown Iron Works of Minnesota?

A. It isn't the same as theirs.

Q. Well, is it the same toaster and plant design used by the Detrex people?

A. No, sir, it isn't the same.

Q. You, of course, at the time L. L. Ford Associates were building this plant, were aware of plants being designed by Crown Iron Works of Minnesota and the Detrex people?

A. I didn't know about Detrex, but I had a drawing of the Crown Iron Works plant.

Q. I believe you and Mr. Reed, your partner under that partnership name L. L. Ford Associates, had an occasion to visit, Plainfield, Iowa where Mr. Roach had tri-extraction plant for soybean meal, did you not?

A. Yes.

Q. Do you know what design his plant was, whether Crown Iron Works or Detrex?

A. I think his extraction and drying design was of Crown Iron Works and part of it wasn't. The toasting equipment wasn't Iron Crown Works . . . I mean Crown Iron Works.

Q. Do you know of your knowledge at that time whether Iowa State College gave license to Crown Iron Works to manufacture any particular design of plants?

A. I don't know that for sure but I think so.

Q. As you stated you and Mr. Reed did make such a visit?

A. Yes.

Q. You are familiar with the fact that hexane extraction had been used in the solvent extraction of soybeans?

A. Yes.

Q. And you were familiar with that all along?

A. Yes.

Q. And you were familiar with that all along?

A. Yes.

Q. You said this morning that hexane is highly volatile I believe?

A. Yes.

Q. And being such many explosions occur when it is used and that is why you investigated trichloroethylene, wasn't it?

A. Yes.

Q. And that is one of the reasons you and Mr. Reed went to Iowa, isn't it?

A. We were interested in the operation.

Q. As the engineer of L. L. Ford Associates and interested in that you had in mind to investigate it properly before you went into the project investing money?

A. I was interested in the recovery of the solvent.

Q. That is what Du Pont, through the representatives you named, were giving you technical assistance on primarily, that is the solvent recovery aspect?

A. Yes, and the toasting of the meal. All of it has to do with the stripping of the oil. We had a letter that dealt with that and had information with reference to the toasting of the meal and before the extraction and after the toasting. It didn't deal with any particular part of it, but the whole operation.

Q. And the economy in connection with the use of hexane and trichloroethylene was in your mind too,

wasn't it; you wanted to find the cinoarusib between the cost when you went to Plainfield, didn't you?

A. Yes.

Q. Putting your money into it you, of course, wanted to investigate that angle of it. Didn't you and Mr. Reed make further investigation with reference to tri-extraction?

A. Yes.

Q. Would it be a fair statement to say that you made considerable investigation?

A. That's too broad a statement; we didn't make investigation enough.

Q. You went to these plants and you read all available literature on the subject, didn't you?

A. All that Du Pont sent us.

Q. You went to Mr. Roach's mill, didn't you?

A. Yes.

Q. Did you go to Mr. Thompson's mill?

A. I did not.

Q. Did Mr. Reed?

A. He might have but I don't know.

Q. Mr. Reed was interested in the Missouri Soybean Company at Carthuerville, Missouri, wasn't he?

A. I was told that.

Q. Did you know that at the time he was associated with L. L. Ford Associates?

A. He wasn't associated with it to my knowledge at that time.

Q. Mr. Ford, I hand you what purports to be a letter dated October 11, 1949 under the letterhead of L. L. Ford Associates; state whether that letter is familiar to you and if you know whose letter it is?

A. It is signed by Lyman Reed.

Q. That was your partner at the time doing business under L. L. Ford Associates?

A. I don't remember when it was written.

Q. You do know that he did write that letter, don't you, and that is his signature. You know his signature, don't you?

A. I am certain that must be his signature.

Q. The Defendant Now Offers in Evidence the letter just identified by Mr. Ford as an exhibit to his testimony.

Letter Marked Exhibit G-14, Defendant, Cross Examination of Ford.

Mr. Thomas:

Page 198, the question, "The defendant now offers in evidence the letter just identified by Mr. Ford as an exhibit to his testimony." The letter was marked as Exhibit G-14, Defendant, cross examination of Ford. That is in the State case.

(Reading continued.)

Q. Now read it.

Mr. Thomas:

While this is being read, they said they wanted our witnesses out. The invoked the rule at this time.

The Court:

All right, sir.

Mr. Thomas:

I will read the question, Your Honor, that I would like to connect up with what I am about to say. This is on 198. "You do know that he did write that letter, don't you, and that is his signature. You know his

signature, don't you?" Answer, "I'm certain that must be his signature."

If Your Honor please, we offer in evidence the letter just identified as Defendant's Exhibit G-14, to the cross examination of Mr. Ford, and we would like to have Mr. Geuther read this letter to the jury.

The Court:
Very well.

(Exhibit G-14 read to the jury by Mr. Geuther of the defense counsel.)

(Reading continued.)

A. I'd rather not.
Q. All right, we will have it read by one of our counsel.

(See Clerk's Record page 438 for copy of exhibit.)

Letter, Exhibit G-14 read to jury by Mr. Callender of defense counsel.

Q. I believe that is the same Mr. Lyman Reed who was your partner at the time?
A. That's right.
Q. Didn't he often times in introducing you to his friends, or others, refer to you as "my favorite genius"?
A. I never heard that.
Q. You never heard that?
A. No.
Q. Would it be a fair question to ask whether or not he looked upon you with confidence as to the engineering aspect of L. L. Ford Associates?

A. I was L. L. Ford Associates. He was sort of like the runner you sent out with this letter.

Q. You were L. L. Ford Associates?

A. That is correct.

Q. The soybean crop you ran at the beginning of your operations and continuously until this meal was shipped to Mr. L. J. Thigpen came from the fall 1950 crop, did it not?

A. No.

Q. What did it come from?

A. The meal shipped to Thigpen came from the 1951 fall crop. I can check my records and see. Yes, it was from the 1951 fall crop.

Q. You didn't have any meal on hand in August when Mr. Armstrong delivered this letter of July 31, 1951?

A. There might have been some.

Q. From the time you first started operations and continuously until you deliberately shut down in the summer you used the 1950 fall soybean crop I believe?

A. Yes.

Q. You purchased that crop in what month of 1950 if you remember?

A. It was accumulated from October 1st until the middle of November, 1950.

Q. You stored them in your 300,000 bushel storage bins, did you?

A. Yes.

Q. You started up about what month in 1951?

A. We started operations in 1951 in October.

Q. I mean when did you start the operation of your plant?

A. About March 15th, 1951 on the 195 crop.

Q. Right after you started up you had an explosion caused by charred meal, did you not?

A. I don't know what caused it, but it was caused from trichloroethylene.

Q. I thought you just said you didn't know what caused it.

A. I don't know what caused it. You said charred meal caused it but you don't know.

Q. Did you have any charred meal on hand?

A. There wasn't any except in this vessel when we opened it after it had exploded and it was burned inside.

Q. Didn't you say at that time charred meal is what set off the explosion?

A. No, I did not.

Q. But you did find charred meal?

A. Yes.

Q. How many days after that was it the Greenville Fire Department had to be called out there?

A. That was several months later, I think.

Q. Was it one or two months later?

A. I couldn't say but it was afterwards. We were not running the beans through the solvent-plant; they had deteriorated in the bins. We were putting them in bags and into the cars and they caught on fire from spontaneous combustion.

Q. Wasn't that caused by an accumulation of bags of soybean meal you had stacked up?

A. It was ground soybeans.

Q. In your processing operation, you have to crack the beans first, do you not?

A. Yes.

Q. And then flake them?

A. Yes.

Q. Had those been cracked and flaked?

A. Cracked and ground but they hadn't had the tri process put to them.

Q. At any rate, the Greenville Fire Department came out and put out the fire, did they not?

A. Yes; it actually was not a fire. Nobody was at the plant and somebody saw smoke coming from the building and . . .

Q. Don't you stay at the plant all of the time while it is operating, or rather, didn't you stay at the plant all of the while it was operating?

A. No, I'd go to lunch.

Q. Did you ever go out of town?

A. Occasionally, yes.

Q. And would that be true during the operations of 1951?

A. The first part of 1951 I was out a good deal.

Q. After this first explosion you had an explosion on March 18th, 1951, caused by an acetylene torch burning the extractor?

A. Yes.

Q. You heard read in evidence the warning made against the use of fire around there, didn't you?

A. That referred to dust in the preparation operation; that's the only hazard that can be considered.

Q. You mean as the engineer of this project and the man they all looked to you didn't know an open flame would set off an explosion from trichloroethylene vapors?

Is that what you tell this jury sir?

A. I didn't know it at that time but I know it now.

Q. You did know it when that explosion occurred?

A. Yes.

(Deletion.)

Q. Mr. Ford, I will ask you whether or not Mr. R. Stuart Armstrong of Du Pont had an occasion to deliver this booklet entitled Chemical Safety Data Sheet S-D-14 on Trichloroethylene"?

Mr. Thomas:

We would like to introduce in evidence a brochure or phamphlet entitled "Chemical Safety Data Sheet S-D-14 on Trichloroethylene". There is not an intervening question, but the next is the answer on account of the stipulated deletions by the parties. Could Mr. Geuther read the answer?

The Court:

All right, sir.

Mr. Thomas:

At this time, we would like to offer in evidence Defendants' Exhibits D-4, D-5, and D-6, D-6 being a card evidently from Du Pont, but it is not clear, but it is dated December, 1951, I believe, is that right? No, this is from Du Pont, but it is not dated except December 18, 1946; is that right?

Mr. Burgin:

We've no objections to that being received in evidence.

Mr. Thomas:

Let them be marked for identification, if the Court please.

(The documents above referred to were marked as Defendants' Exhibits D-4, D-5, and D-6 for indentification, to the cross examination of Mr. Ford.)

The Court:

Very well, sir, let them be marked.

Mr. Thomas:
We now ask that those documents be received in evidence.

Mr. Burgin:
No objections.

The Court:
Let them be received.

(The documents heretofore marked as Defendants' Exhibits D-4, D-5, and D-6 for identification to the testimony of Witness Ford, are received in evidence.)

Mr. Thomas:
If the Court please, we would like to have one short excerpt from Defendants' Exhibit D-5 read to the jury.

The Court:
All right, sir. Mr. Geuther can go ahead and read it.

(Excerpt read.)

(Reading of Mr. Ford's testimony continued.)

(Deletion.)

A. I might have gotten it, but I don't remember whether he gave me that or not.

(Deletion.)

(Deletion.)

(Exhibit G-15, Chemical Safety Data, see SD-14, Trichloroethylene, offered by defendant.)

A. We could have but I don't recognize it.

(Deletion.).

Q. I hand you what purports to be a card and I will ask you whether you recall having received that from Mr. Armstrong, or anyone, with Du Pont Company in 1951?

A. I could have but I don't recognize it.

(Deletion.)

Card, Exhibit G-16, offered by defendant on cross examination.

Q. And as you have said, Mr. Ford, whatever Du Pont sent you, you read as engineer and the main man of Magnolia Soy Products Company, is that right sir?

A. Yes.

Q. Did you read it?

A. Yes.

Q. All right, would you mind reading this, please sir.

A. My eyes aren't doing so good. Let somebody else read it.

Pamphlet, Du Pont Chlorinated Hydrocarbons, Exhibit G-17, same as Plaintiff's Exhibit XXX-1, offered in evidence by Du Pont on cross-examination. One paragraph—second paragraph, column 2, page 8 of Exhibit G-17 read to the jury.

(Deletion.)

Q. I hand you a pamphlet attached as Exhibit A to Answer #17 of E. I. Du Pont De Nemours & Company, which answers were filed and introduced in evidence yesterday, state whether you received that pamphlet from Du Pont in 1951 about the time you began operations?

A. I could have.

(Deletion to end of page.)

(See preceding page.)

(Deletion.)

Q. Mr. Ford, as engineer and main man for Magnolia Soy Products Company Mr. Frank McDonald, your plant superintendent, told you repeatedly to get out this space heater you had in your plant, didn't he?

A. I deny that.

Q. Did he tell you anything like that?

A. He never told me that at any time. He was plant superintendent and he had a right to move it if he wanted to.

Q. Were you his superior or inferior?

A. I was a stockholder of the Company; at the time he was there I did not manage the affairs.

Q. You left it up to Mr. McDonald, did you?

A. I was about the plant to be sure but not all of the time.

Q. Were you Vice President of the Company?

A. Yes.

Q. You didn't have the right to fire him or get after him?

A. I did and I did do it, but so far as this space heater is concerned you referred to he could have moved it or left it at his discretion, and if I remember correctly he did move it at times.

Q. Do you deny he told you repeatedly in March, April, and May that space heater had to come out or an explosion was going to happen?

A. I deny it.

Q. Being about the premises quite often you say that space heater on and lighted, did you not?

A. Not during May and April.

Q. Well, when did you see it lighted?

A. During the cold weather when the plant was being erected and operated.

Q. Do you deny it was lighted in the months of March, April, and May? That is, 1951?

A. I don't deny it. I don't know that it was and don't deny it wasn't.

Q. You were not about the premises all of the time, were you?

A. No.

Q. Mr. McDonald was your plant superintendent?

A. Yes.

Q. Didn't Mr. R. Stuart Armstrong tell you that space heater had to be removed, that the fire in it could cause an explosion?

A. I deny it.

Q. He didn't tell you that at any time at the plant or anywhere else?

A. He didn't tell me it could cause an explosion.

Q. Did he point it out and tell you it lighted and had to come out?

A. No.

Q. You had this second explosion caused by an acetylene torch burning of an extractor on March 18, 1951, didn't you?

A. Yes.

Q. I believe one of your employees was working with welding equipment on an extractor burning a hole, was he not?

A. Yes.

Q. How many thousands of bushels of soybeans burned by spontaneous combustion or any other method at any time during your operations, Mr. Ford?

A. You mean in the mill?

Q. Yes, or in your bins, altogether?

A. I couldn't say.

Q. Up in the hundreds of thousands, wasn't it?

A. More or less.

Q. You used those beans, didn't you?

A. Not to make meal. We sold the burned beans for fertilizer. We didn't extract oil from them. We ground them into fertilizer.

Q. You carried them through the grinding process, did you?

A. Yes.

Q. And the flaking process?

A. Yes, and into the grinder and into bags.

Q. None of the burned beans went into the soybean meal you sold?

A. I didn't say there wasn't any, but ones completely destroyed as a whole they were not used; and partially destroyed ones were used in the meal products. You couldn't separate them right down to the last bean, you know.

Q. All the while when you first began operations in March and continuously until you closed you had a contract with St. Louis Terminal Warehouse to bond your inventory of soybeans, didn't you?

A. Yes, sir.

Q. Mr. Ford, what became of $150,000 worth of beans that disappeared from the bins and storages in May?

A. I don't know.

Q. They did disappear, didn't they?

A. I don't know.

Q. You didn't know about that, sir?

A. Mr. Warren put most of the money into this thing and he was a merchant and had charge of the buying and selling of beans at that time.

Q. You will admit that at least $100,000 worth of beans disappeared, won't you?

Mr. Brooks:
(Page 208.)

If the Court please, would you instruct the jury to disregard that question.

The Court:
Yes, sir, I can't see how that could possibly have anything to do with this.

(Reading of Mr. Ford's testimony continued.)

(Deletion.)

Q. You shut down about June 6, 1951, did you not?
A. Sometime in the early spring.

(Deletion to end of page.)

Q. I withdraw that question. Did you shut down in June?

A. Yes.

Q. One of the reasons for which was that you had considerable beans badly burned, wasn't it?

A. Yes.

Q. And also because a considerable amount of beans disappeared from storage there, is that right?

A. I can't say about that.

Q. You shut down also because you were practically out of funds and credit; you told Mr. Armstrong that, didn't you?

A. I don't remember telling him that.

Q. Did you tell Mr. McDonald or Mr. Armstrong at any time that is one of the reasons you had to shut down?

A. I did not and would not pass out that information, no, sir.

Q. On September 22nd, 1951, I believe Mr. McDonald left to go to the Air Force, didn't he?

A. About that time, or I heard that.

Q. On November 2nd, 1951, you had a terrific explosion in your plant, didn't you Mr. Ford?

A. About that time.

Q. And unfortunately a man was killed in that explosion, was he not?

A. Yes.

Q. One of your employees?

A. Yes.

Q. As an engineer did you inspect and find out that too was caused by acetylene torch?

A. Never could determine that. It was so utterly destroyed we couldn't determine what was the cause of it.

Q. After Mr. Armstrong delivered this letter, about August 2nd, 1951 . . . you remember the occasion?

A. Oh, yes, I remember the occasion.

Q. You were shut down at that time I believe?

A. Yes.

Q. And when did you start up operations again?

A. We started operations on the 23rd of September.

Q. 1951?

A. That is correct.

Q. After August 2nd, 1951, or whatever date Mr. Armstrong was there to deliver that letter of July 31, 1951, were you selling those burned soybeans as fertilizer then?

A. Some of them.

Q. At the time Mr. Armstrong delivered this letter of July 31, 1951, were you then and thereafter at any time selling burned beans as fertilizer?

A. We were.

Q. You were not manufacturing any beans until you began operations in September?

A. That's right.

Q. Were you selling any meal you had on hand at that time, on August 2nd and thereafter until you began operations?

A. If we had any we sold it for fertilizer. I don't know how much we had.

Q. Mr. Ford I want to ask you if this is not true: didn't your plant superintendent, Mr. Frank McDonald, tell you many times he could not get the temperature up in that plant to 240 degrees Fahrenheit or to 120 degrees Centigrade?

A. He did not. That was not true. It was possible and it was maintained at that temperature.

Q. You told Mr. Morse, I believe, about raising it to 255 degrees Fahrenheit in the last two vats, I believe?

A. In vats 4 and 5.

Q. You were not there all of the time to know whether that was done or not, were you?

A. I was in and out periodically and they had instructions to hold it there at that temperature and anytime it fell below that to stop the inflow and outflow unil the temperature reached that point. I think my analysis will show it was properly cooked.

Q. Didn't Mr. Frank McDonald tell you, "We have a defective cooker basket and it goes away below" and you told him to go ahead anyway?

A. I don't remember a conversation of that kind.

Q. Well, did he make any statement to that effect? That the equipment was defective and it would go away below and you told him to go ahead?

A. I deny that statement.

Q. You deny you told him to go ahead, sir?

A. I deny it.

Q. You deny, do you, that you told Frank McDonald, your plant superintendent, when he told you the equipment was defective and the temperature would go away below to go ahead?

A. I gave him instructions as to how much temperature I wanted it cooked at and any time it fell below that to stop the inflow and outflow until the temperature went back up.

Q. Do you tell us that's the only instructions and statement you made in the plant, or elsewhere, to Mr. Frank McDonald, sir?

A. About the temperature of the meal that was the instructions.

Q. And that is the only instructions given Mr. McDonald about the temperature, is that right?

A. Yes, of the meal.

Q. I want to ask you, Mr. Ford, if this isn't a fair question: didn't Mr. Frank McDonald, your plant

superintendent, tell you sometime in April, or sometime before the summer when you closed down, that if you required him to keep up this high production he couldn't get the temperature at that time?

A. That was discussed. We never did attain high production at that time.

Q. Were you pushing him for high production, sir?

A. Not particularly, but good production.

Q. Didn't he tell you that if you pushed him for high production he could not possibly reach that temperature?

A. The moisture of the beans were so high—

Q. They were green?

A. No, they were not green. The vessel was rated at 8000 pounds per hour and would take beans at 11 per cent moisture. The way it was designed it would cook to that temperature 8000 pounds per hour and if the moisture in the beans was 18 per cent it wouldn't do that. We never operated during that time you are speaking of over 5000 pounds per hour.

Q. I want to ask you if this is not true: didn't Mr. Frank McDonald tell you, "You are pushing me to get this high production and I can't get safe temperatures" and you told him to go ahead?

A. No, sir.

(Deletion.)

Q. Do you deny that?

A. I deny it.

Q. Didn't he tell you, "Mr. Ford, I can't get this safe temperature we have to have because you are pushing me with defective cooker baskets and you can't sell it for cattle feed", and you said, "We are going to sell it only for hog and chicken feed"?

A. I deny that.

Q. You deny ever telling him that at any time?

A. I did not tell him that.

Q. Frank McDonald never did protest to you about your safe temperature?

A. He had instructions to do what I told him and so far as I know he did.

Q. You were out of beans and you were closed down and then you started up operations September 23, 1951; isn't that right, sir?

A. Yes.

Q. Didn't you purchase and have to use some green beans?

A. We bought beans right from the wagons.

Q. Wasn't that right shortly before the crop was really mature?

A. It might have been.

Mr. Thomas:

At this time the defendant Du Pont would like to introduce Exhibits D-7 and D-8, if Your Honor please. We would like to introduce them in evidence.

The Court:

Very well. Let them be marked and received in evidence.

(The documents above referred to were marked Defendants' Exhibits D-7 and D-8 for identification, to the cross examination of Mr. Ford, and are received in evidence.)

Mr. Thomas:

If Your Honor please, may Mr. Geuther read the letter?

The Court:
Yes, sir.

(The letter was read by Mr. Geuther.)

The Court:
Gentlemen, it is now 10:30. We will take a recess until 10:45.

(Brief recess.)

(Following the recess, the hearing of the case was resumed.)

(Reading of Mr. Ford's testimony continued.)

Q. Mr. Ford, didn't you write a letter February 14, 1952 to Du Pont?

(Deletion.)

Q. State whether or not you remember writing to Du Pont Company and telling them about the majority stockholders threatening action against L. L. Ford Associates about this mill?

A. Let me see whether or not that is my signature. I don't remember writing it.

Q. All right, sir, take a look at it.

A. I wrote this letter and signed it.

Letter, February 14, 1952, L. L. Ford to Shepherd, Exhibit G-18, offered by du Pont on cross-examination.

(Deletion.)

Q. At this time you wrote not to Mr. R. Stuart Armstrong but to Mr. C. B. Shepherd, Manager of Chlorine Products Division, is that right?

A. That's right.

Q. Do you remember anything now about telling him, Mr. Shepherd, you received that letter from Mr. Shepherd dated July 13, 1951 which has been introduced in evidence?

A. I recall it.

(Deletion.)

(Exhibit G-18, read to jury on cross-examination.)

Q. In this letter to Mr. C. B. Shepherd, Manager of the Chlorine Products Division, you made this statement: On July 31, 1951 you wrote that some trouble had developed from feeding trichloroethylene extracted meal and advised us to channel our meal to poultry and hog feeders." Why didn't you tell Mr. Shepherd about Mr. Armstrong telling you to go ahead and sell it for cattle feed if it was so, Mr. Ford?

A. I was writing to Mr. Shepherd.

Q. You were writing to the Manager, Chlorine Products Division?

A. That's right.

Q. But you didn't tell him anything about Mr. Armstrong saying "go ahead and sell it for cattle feed", did you? If he said that, why didn't you tell it in that letter, sir?

A. He said it.

Q. If he said it, why didn't you say something about it in that letter?

A. I was writing to Mr. Shepherd and I had no reason for telling him. I wanted Mr. Shepherd to share this responsibility with me.—(deletion.

(Deletion.)

Q. You told Mr. Morse on direct examination and repeated to me on cross examination, did you not, that Magnolia Soy Products Company was merely a corporation having the same incorporators and stockholders as the partnership of L. L. Ford Associates, is that right, sir?

A. That is correct.

Q. As a matter of fact weren't the incorporators and personally known to you, two secretaries in the office of Messrs. Wynn, Hafter, Lake & Tindall?

A. Actually they were the incorporators because under the law it has to be done or handled that way.

Q. So you were mistaken about it when you said the incorporators of the corporation were the same as the partnership of L. L. Ford Associates, weren't you?

A. I was mistaken. I meant it was incorporated and we purchased the stock and put in the capital.

Q. Do you say that the stockholders of Magnolia Soy Products Company were the same persons as the partnership . . . were the same persons as those in the partnership of L. L. Ford Associates?

A. That is correct.

Q. As a matter of fact, when you had this organizational meeting February 3, 1951 at Greenville, wasn't there five directors elected at that time, namely: J. M. Warren, L. L. Ford, Lyman Reed, W. T. Wynn and A. F. Toler?

A. Actually there was

Q. Did they hold stock?

A. Mr. Toler one share and Mr. Wynn one share.

Q. How many shares were issued by the corporation?

A. 25,000 shares.

Q. And with the exception of the one to Mr. Wynn and one to Mr. Toler, Mr. J. M. Warren, L. L. Ford and Lyman Reed owned all the remainder of the stock, is that correct?

A. Yes.

Q. Mr. Ford, why did you tell Mr. C. B. Shepherd in this letter marked Exhibit G-18, Defendant, cross examination Ford, as follows: "the majority stockholders are threatening action against L. L. Ford Associates to recover the cost of the extraction plant which amounts of $265,000. The L. L. Ford Associates are in no position to take this responsibility alone."

A. I made that statement because a majority of the stockholders, who was Mr. Warren, had made such a statement to me.

Q. You have testified he was a partner and member of L. L. Ford Associates, I believe.

A. Yes.

Q. You mean Mr. Warren as majority stockholder was going to sue himself?

A. That was the information he gave to me. He said, "I'm going to sue you and Lyman and everybody . . . I'm going to try to recover my money."

Q. Didn't Mr. Warren disappear when that $150,000.00 worth disappeared from St. Louis Terminal Warehouse in May, 1951?

A. He did not disappear.

(Deletion.)

Q. You say the "majority stockholders" referred to in this letter is Mr. Warren?

A. He held the majority of the stock.

Q. Why did you say in the letter "the majority stockholders" if he was the only one? Can you explain that, sir?

A. I don't know. It might be a typographical error.

Q. You mean it is one majority stockholder. If Mr. Warren, the majority stockholder, was a partner in L. L. Ford Associates, why did you represent to Mr. Shepherd in this letter: "This soybean mill was built by the writer and Lyman Reed doing business as L. L. Ford Associates and sold to the Magnolia Soy Products Company." Why did you make that statement when you knew Mr. Warren was a partner in L. L. Ford Associates?

A. I can't account for that.

(Deletion.)

Q. In October, 1951, weren't you advised that the American Feed National Official Association had passed a resolution that all soybean processors should cease selling soybean meal extracted with trichloroethylene as cattle feed until they found out what was causing the deaths?

A. I was not a member of that association and was not so advised.

Q. And I believe you have told the jury you did not subscribe to the trade journal Feed Stuffs?

A. I have no recollection of subscribing to it.

Q. That's all. Thank you, Mr. Ford.

Mr. Burgin:

If he Court please, there is only a small amount of direct testimony, Your Honor.

The Court:

Well, skip the first questions on page 219, and go ahead.

(The testimony of Mr. Ford continued.)

(Deletion.)

Q. Mr. Ford, do you know whether or not any of the burned soybean meal Mr. Thomas so persistently questioned you about was in this Atchison, Topeka, Santa Fe car #30530 . . . I believe that was the number . . . shipped to Mr. L. J. Thigpen?

A. I know there was not any

Q. After these various explosions Mr. Thomas went into so thoroughly, was the plant rebuilt?

A. Yes.

Q. And was it rebuilt in accordance with the original instructions and recommendation Du Pont made to you?

A. Yes.

(Deletion.)

A. It was replaced exactly like it was before.

Q. How was it rebuilt?

A. It was rebuilt as it was originally designed.

Q. Who aided and assisted you in the design of this machinery?

A. Du Pont aided me in the design of it.

Q. Such recommendations and designs you have testified they advised you as to, tell the jury whether or not those were the ones the machinery was rebuilt in accordance with?

A. Yes, the machinery was rebuilt according to its original design; it was not changed or altered a bit.

Q. That's all.

(Deletion.)

Q. What letters did you get from the Du Pont Company about that rebuilding after November 2nd, 1951?

A. I don't recall any.

Q. You didn't get any, did you?

A. I might have, but I don't remember any.

Q. You didn't get any information from Du Pont after November 2, 1951 about rebuilding this machinery, did you?

A. I don't recall it.

Q. That's all.

Re-Direct Exam.

By Mr. Morse:

Q. The plans and specifications you testified to you rebuilt the plant according to, they were the original ones furnished to you by the Du Pont Company, is that right?

A. Yes.

Q. That's all.

(The testimony of Mr. Ford was concluded.)

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(Title Omitted.)

RAYMOND T. VAUGHN, a witness called by and on behalf of the plaintiffs, was duly sworn, the oath being administered by Ray Ligon, Deputy Clerk.

Direct Examination.

By Mr. Tavares:

Q. Will you give us your full name, please?

A. Raymond T. Vaughn.

Q. And your address?

A. 932 Biggs, Memphis, Tennessee.

Q. What is your present business?

A. I am Professor of Chemistry and head of the Chemical Department at Southwestern College, Memphis, Tennessee, and Director of Research and Consulting Services with the Barrow-Agee Laboratories in Memphis.

Q. What colleges or universities have you graduated from?

A. I have a Bachelor's degree from Culver Stokton College in Missouri, which I obtained in 1933, a Master's degree from the University of Missouri, which I obtained in 1942, and a Ph.D. from the University of Missouri, in 1948.

Q. Will you describe briefly in addition to what you have already stated or included, what positions you have held up to this time?

A. I came to Southwestern College in 1942 as Assistant Professor of Chemistry; I became head of the department in 1945, and I am still in that capacity; and I became associated with the Barrow-Agee Laboratories in 1951.

Q. And Barrow-Agee Laboratories are what?

A. They are consultants and analytical laboratories.

Q. In what field?

A. The field of chemistry.

Q. Have you done any reading relating to the history and effect of feeding of soybean oil meal which has been extracted by the use of trichloroethylene as a solvent, to cattle?

A. I have.

Q. Will you briefly describe the books and articles you have read in that connection, or some of them?

A. Some of them, those which I consider more pertinent; in the July issue of Journal of American Oil Chemists Society. There is an article by Warren Goss of Pillsbury Mills, entitled, "Trends in Oil Seed Industry", and in that article, there are a number of references listed, among those are one by Sir Stuart Stockman; in the Journal of Comparative Pathology and Therapeutics, which was published in 1916, or written in 1916, with reference to an article by Doctor Stang, entitled "Cause of and Cure of Diseases", published in 1927.

And there is an article by Twihouse entitled "The Presence of Hemorrhagic Factor in Soybean Pellets Extracted with Trichloroethylene as Solvent", which appeared in the Veterinary Medicine, in November, 1951; and there are two papers entitled "Aplastic Anemia of Cattle Associated with Injestion of Trichloroethylene Extracted Soybean Meal." These appeared in the Journal of American Veterinary Medical Association in July of 1952, and in August of 1952, those were by Pritchard, and other authors.

I am also familiar with the two books by Markley of the Southern Research Laboratory in New Orleans, dealing with the soybean and soybean products.

Q. What is the title of those books?

A. "Soybeans and Soybean Products."

Q. Have you made any chemical analyses of trichloroethylene extracted soybean oil?

A. Our laboratory has, yes.

Q. Have you made them of soybean oil meal, also?

A. Our laboratory has, yes.

Q. When you say "our laboratory", you mean the Barrow-Agee Laboratory?

A. That is right.

Q. And I believe you stated you are a consultant for that laboratory?

A. That's right.

Q. Now basing your opinion on your educational background, your past professional experience, the research you have testified to, the laboratory tests you have conducted, and all other information gained by you in your professional work, do you have what you consider a well-founded opinion upon the question of whether trichloroethylene extracted soybean oil meal, if fed over a substantial period of, say one or two months, is toxic to cattle?

A. I have.

Mr. Thomas:

If Your Honor please, we object, because of lack of qualifications of the witness as to toxicology in the field of causation.

The Court:

The objection is overruled.

(By Mr. Tavares):

Q. What is that opinion?

A. It is my opinion that in the processing of soybean meal by the trichloroethylene extraction processes, that a toxic material, which is poisonous, is produced.

Q. Now in your opinion, is raw soybean itself toxic to cattle when used as cattle feed?

A. No.

Q. In your opinion, is trichloroethylene, fed to cattle one to three ounces daily, toxic to cattle?

A. No.

Mr. Thomas:

If Your Honor please, may it be understood that we are objecting to all of this testimony?

The Court:

That's correct. That is, if you are objecting to it on the basis of lack of qualifications of the witness.

Mr. Thomas?

Yes, sir, we are objecting to it for lack of qualifications in the field of toxicology and causation.

The Court:

All right, sir. Go ahead.

(By Mr. Tavares):

Q. Doctor Vaughn, what, in your opinion, causes the toxicity of trichloroethylene processed soybean meal as cattle feed?

A. It is my opinion that in these processes, there are reactions occurring between the meal and the trichloroethylene which is toxic in the materials that are produced.

The Court:

Now let me ask the witness one question to clarify the situation with me, and possibly with the jury.

Doctor, as I understand you, then you say that the soybean itself is not poisonous?

The Witness:

That is correct.

The Court:

That the trichloroethylene itself might be fed to cattle in reasonable amounts and not be poisonous?

The Witness:

That is correct.

The Court:

But that in the extraction processes, a reaction takes place which does create a poison?

The Witness:

That is right.

(By Mr. Tavares):

Q. Will you state what experience, if any, you or your laboratory, Doctor, which I understand to be the Barrow-Agee Laboratory, have had in analyzing tri processed meal manufactured by Magnolia Soy Products Company of Greenville, Mississippi?

A. I understand our laboratory has analyzed a number of oil samples, and we have analyzed some of meal samples also.

Mr. Thomas:

If the Court please, we object to his "understanding", for the reason that it is hearsay.

(By Mr. Tavares):

Q. Now on what is that understanding based, Doctor?

A. The understanding is, the thing is, that many of these analyses were made before I joined the laboratory.

Mr. Thomas:

If the Court please, that is what we object to.

The Court:

That objection would be sustained, yes, sir, as to that part of the question.

Mr. Tavares:

Your Honor, I don't want to argue, but I would like to just state I was going to ask this witness whether in the regular course of business in his laboratory, he gained this information.

The Court:

I think he says they analyzed the meal after he came there. I think the other would be just hearsay, gentlemen, what he understood they had done.

(By Mr. Tavares):

Q. Doctor Vaughn, were any of the analyses made in the laboratory of soybean oil or soybean meal, made after you became a member of that laboratory, or an employee or consultant?

A. Yes, we analyzed soybean meal for the Magnolia Soy Products Company after I was employed by the Barrow-Agee Laboratory. As to oil, I don't recall that we analyzed any oil, but we did analyze meal.

The Court:

Let's go on with the meal, gentlemen. Oil is not primarily concerned with the matter here.

Mr. Tavares:

Will Your Honor, in the Court's ruling, just to clarigy this. Even if Doctor Vaughn was a member of the laboratory—

The Court:

I am holding it is competent for him to testify with respect to the meal analysis made after he came, but the oil analysis made before that time probably is not comptent; but it seems to me oil is not entering into this. It is the meal you are interested in, and I hold his testimony with respect to meal is competent.

(By Mr. Tavares):

Q. Doctor Vaughn, do you of your own knowledge—as I understand, do you know of your own knowledge of samples of soybean oil meal having been tested in the Barrow-Agee Laboratories?

Mr. Thomas:

If Your Honor please, we object to any testimony concerning analysis of meal unless it is shown to be the suspect meal in these three cases.

The Court:

I don't think that objection is well taken. This testimony shows, I think, without any contradiction at all, that the Magnolia soybean meal was made by some processes using trichloroethylene as a solvent. The objection is overruled.

(By Mr. Tavares):

Q. Well, Doctor, do you have what you consider a well-founded professional opinion as to whether whatever amounts of trichloroethylene were found in samples taken from Magnolia Soy Products Company's product, were in indicative in themselves of toxicity or non-toxicity of the meal?

A. I don't think the quantity of trichloroethylene you find is indicative of toxicity, but the fact that you find trichloroethylene being present at all indicates that process was used, and you would expect then a toxic product from the process.

Q. Doctor, please state what effect, if any, in your opinion, the temperature at which tri processed oil meal is processed, would have on the toxicity or non-toxicity of such meal as cattle feed?

A. Well, from a knowledge of chemistry, we usually—the reaction we expect—Let me put it this way. We expect reaction to take place at higher temperatures then low temperatures, and I would expect the temperature to have an effect on the material produced, and generally from our knowledge of chemistry, the higher the temperature, the greater quantity of reacting material is produced in a given quantity of time.

Q. Doctor Vaughn, do you know whether trichloroethylene is listed in the United States Pharmacopoeia?

A. Yes, sir, it is.

Q. Well, Doctor Vaughn, does that mean it is classed in the United States Pharmacopoeia as a drug?

A. That is my understanding.

Mr. Tavares:

No further questions, Your Honor.

The Court:

Very well. All right, gentlemen, you may cross examine.

Cross Examination.

By Mr. Thomas:

Q. If Your Honor please, Doctor Vaughn, have you personally witnessed, or has your laboratory under your supervision, ever performed or conducted any feed experiments with cattle where trichloroethylene extracted soybean meal was involved?

A. No, sir.

Q. So other than the articles you have mentioned and read off just now, have you read any other articles or studied any literature in regard to trichloroethylene?

A. Yes, sir; I have. These were just some of the articles.

Q. They were just some of them?

A. Yes, sir, that's right.

Q. Doctor, when did you read these articles that you testified about?

A. I read some of them back in 1952 when this problem came up. Others I read recently.

Q. All right, sir. Would you say in 1952 that you had read the article by Twehouse and Leasure, appearing in the November 21 issue of Veterinary Medicine?

A. No, sir.

Q. When did you read that?

A. Yesterday.

Q. Yesterday?

A. Yes, sir.

Q. Now with reference to the two articles appearing respectively in the July and August issues of The General American Veterinary Medicine?

A. That's right, yes, sir.

Q. When did you read those?

A. I read those yesterday.

Q. You mentioned an article by Stockman. Did you trace that reference out?

A. Yes, sir.

Q. Now that is where Stockman concluded that even cows fed one to three ounces of tri itself, it was not toxic or poisonous, is that right?

A. That's right, yes, sir.

Q. And that was over an extended period of time, too, wasn't it, Doctor?

A. That's right.

Q. That is what Stockman said, is that correct?

A. That is correct, yes.

Q. Now Doctor, do you recall this article by Twehouse and Leasure, that you said you read yesterday, now the main portion or the blocked-off portion there, didn't it state that many thousands of pounds had been fed satisfactorily to cattle over the past, without any ill results, isn't that right, sir?

A. I think in all of these articles that have been referred to, it has been stated that in not all cases where they were fed trichloroethylene extracted meal, that cows died. I think that is definitely stated.

Q. Didn't in fact, Doctor, the same articles refer to the fact that over sixty million pounds of trichloroethylene extracted soybean meal had been fed without any poisonous results; do you recall that?

A. I don't recall that.

Q. You don't recall that statement?

A. No, sir.

Q. But you do remember it stated that substantial quantities had been fed without any ill results, is that correct, sir.

A. I wouldn't say it stated "substantial quantities, but in reading these articles, the statement was made from time to time, that this meal had been fed to cattle from which no toxic results were obtained. It was not true in all cases. It depends upon the cattle and so forth.

Q. Doctor, you told us a moment ago about heat; would you say that heat is a variable in trying to isolate a toxic or poisonous factor, would you say you would like to know what the heat was?

A. No, not in isolation. I don't think so. No, I don't think I would be concerned with that.

Q. Well, Doctor, how do you attribute the fact that the literature says that many thousand pounds were fed to cattle with no ill results, and the fact that some died later on on certain outbreaks which occurred when some died, and others didn't?

A. I think that would be attributable to two things. One is the amount that was fed, and two, the condition of the cattle. I think that those in many instances show that greater quantities were fed them than in other instances.

Q. Are you telling us that heat processing had nothing at all to do with the creation of a toxic factor or not?

A. No, sir, I am not saying that. I think we do not know, except what is based on the theory of chemistry. I think that is all you could say as far as heat is concerned.

Q. By the way, is this determination in the field of chemistry or in the field of toxicology, what would you say to that?

A. I think it is—in the determination of toxic material, that would be chemistry, chemistry precedes toxicology. You must have a chemical analysis, you must isolate the material if you are going to determine what the material is, and then toxicology comes in there, of course, which would be the effects on the animals.

Q. Now Doctor, of course, as you have told us at Memphis, in your deposition, you are not a toxicologist?

A. That is right, sir.

Q. You told us that, didn't you?

A. Yes, I did, and I say now, No, I am not.

Q. Now to determine whether or not there is trichloroethylene present in the residual meal or not, that is a chemistry problem, is it not?

A. That's right.

Q. And that is what you were speaking of when you said your laboratories have analyzed some of Magnolia Soy Products Company's meal?

A. That's right.

Q. Now did you do that both quantitatively and qualitatively?

A. We do it quantitatively.

Q. You do it quantitatively?

A. That is correct.

Q. And that is a chemistry problem?

A. That is right.

Q. But you told us that you have not found trichloroethylene by itself to be poisonous to cows even though fed over an extended period of time, as all the literature bears out, is that correct?

A. Yes, sir, that is right.

Q. And you told us also that the soybean itself is not poisonous, is that right, sir?

A. Yes, sir, that's right.

Q. Now when you get into ascertaining when trichloroethylene, a non-poisonous substance, meets the soybean, another non-poisonous substance, is that in the field of chemistry or in the field of toxicology to determine whether or not it is a toxic reaction and what reaction takes place?

A. Well, I think that would be in the field of chemistry. I think I can give you an example of it.

Chlorine is a very toxic material. Sodium is a very reactive material. Chlorine would certainly come in the field of toxicology. You mention the two together, that is, mixed chlorine and sodium together, in a chemical laboratory, and you have ordinary sodium chloride, which is certainly non-poisonous.

Q. By the way, Doctor, what is table salt?

A. Sodium chloride.

Q. Sodium chloride; is that poisonous?

A. No.

Q. Isn't that a chlorine, isn't it out of the chlorine family?

A. That's right, sodium chloride, now it would be poisonous if taken in large amounts, and that is true to certain animals, but generally speaking, we consider it a non-poisonous material.

Q. Now taking ordinary table salt, Doctor, you could feed that even to human beings over a long period of time, and produce death, couldn't you?

A. Yes, I think—Well, there again you bring up this question of toxicity, and of course, it is a question of the material and of the nature of the poison that is in effect of it on the organisms, and I

think it is a real difference. I am sure that we all know that people cannot drink sea water out on the ocean, and it does, or in some cases, could produce death, but as we use it in ordinary living, of course it does not.

Q. Now Doctor, as a matter of fact, in the field of chemistry, even most any chemical you could take, if used in an unusual way for an extended period of time, you are telling us that it creates a toxic cindition?

A. Well, I think you would have to clarify "unusual way" in that case.

Q. Now Doctor, with reference to—you told us frankly you have never conducted any feed experiments with cattle, have you, yourself?

A. No, sir.

Q. And never has your laboratory, the Barrow-Agee Laboratory conducted such feed experiments, itself?

A. No, sir.

Q. And you have never witnessed any feeding tests with cattle with trichloroethylene extracted soybean meal, have you, Doctor?

A. No.

Q. And Doctor, have you made studies, I mean have you made studies with reference to guinea pigs or anything by feeding trichloroethylene extracted soybean meal to see what it will produce?

A. No, not actually made any experiments, no, sir.

Q. And as you told us in tracing out the reaction that might take place between the soybean and the trichloroethylene, that heat could be a variable, couldn't it, as to toxicity or not?

A. That is a question there, as far as heat is concerned, you would expect a reaction. Now let's answer it this way. We would expect a reaction to occur when the trichloroethylene and the soybean meal were mixed. Now from principles of chemistry, I would expect that same reaction to occur at a greater rate at higher temperatures.

Q. You mean that if even the heat was produced at over, say, 249 degrees Fahrenheit for, say, 30 minutes or more, that that would not have any effect on the so-called toxic principle?

A. That would depend a lot on your toxic material. Now, and in what you are basing your toxicology on of the formation of this material, but in general, from chemistry, I would not expect the heat to be the principal cause of whether you have a toxic material or do not have a toxic material, just from my knowledge of chemistry, I would not expect that to be the principal reason why you would have a toxic or a non-toxic material, when we are considering a reaction between trichloroethylene and the soybean meal. Now in general, I would expect, from my knowledge of trichloroethylene, I would expect a reaction to occur at the higher temperature rather than at the lower temperature. The more oil produced, let's say, it is a question of quantity here in a chemical reaction. The time that you have for the reaction to occur in the process.

Q. Doctor, are you telling us that heat does not have anything at all to do with it?

A. No, I am not saying that. What I am saying is, according to chemistry, that I would not expect it to be the controlling factor, if that is what you are trying to say, that heat is the controlling factor. I wouldn't expect it to be.

Q. Would you expect it to be in a combination with other factors to throw it one way or the other?

A. No, I don't think I could say, I wouldn't say.

Q. And Doctor, you frankly say you have never witnessed the reaction between the soybean, made in the chemistry tests in that connection, between soybean and trichloroethylene, is that right?

A. No, sir, we carried no experiments dealing with that, no, sir.

Q. And your sole information is that gathered from the literature as to any reactions that might take place between the two articles?

A. That, and my knowledge of just trichloroethylene. I think if you studied the nature of that molecule and its chemical properties, I think you could see what you would expect, you would see that you would expect certain reactions, and those could be enumerated, and I think if you have the conditions whereby any two materials will react, say, with the protein in the soybean meal, that then you have a condition for producing a substance which could be toxic.

Q. How about the age of the bean, whether it is mature or green, would that be a variable, also?

A. I think it could be, yes.

Q. As a matter of fact, this literature you spoke of mentioned that as being a variable, didn't it?

A. Not that I recall. I think they did mention this, that in some feeding experiments, they had fed spoiled soybeans, and yet there were no effects.

Q. No what?

A. No effects on the cattle when even fed spoiled soybeans.

Q. That was spoiled soybean extracted—

A. No, no, not extracted soybean meal. We were just talking about soybeans at this time now, and

after they had fed spoiled soybeans, there was no effect in this particular case.

Q. Doctor, what is the characteristic odor of trichloroethylene?

A. Oh, it's a sweet—in chemistry, we think of it as being a sort of sweet odor similar to other chlorinated hydrocarbons of that nature.

Q. I believe, Doctor, in your Memphis deposition taken April 8, 1953, in the case of Ladner Vs. Du Pont, that you testified when questioned, a question by Mr. Williams, that was referring to a question I asked you, he asked you also if the amount of trichloroethylene that you found in this sample was sufficient to poison cattle, that you answered as follows:

"I am not prepared to answer that question, as I have no knowledge of the toxicity."

Do you recall that question?

A. At that time, that was right.

Q. And you never witnessed or conducted any experiments since that time yourself, have you?

A. No.

Q. In feeding animals?

A. No. The statement we made was based on Stockman's Report, which I have read since that time.

Q. Yes, sir. Now Doctor, didn't you also say, and I quote,

"I read the Twehouse and Leasure articles in the Veterinary Medicine, the issue of November, 1951."

Didn't you say that at that time?

A. No, sir.

Q. You did not?

A. No.

Q. Doctor, when you got your Ph.D., or prior thereto, had extensive studies been made by you as to trichloroethylene?

A. No, I did not, no, sir.

Q. Sir?

A. The answer is no.

Q. You hadn't made any extensive studies at that time?

A. No.

Q. Doctor, what is the toxic factor produced by these two non-toxic factors, namely soybeans meeting or coming in contact with trichloroethylene?

A. I don't know. I don't have any information as to what the toxic factor is. I presume you mean the poisonous material?

Q. Yes, sir.

A. No. I don't know what it is.

Q. You do not know?

A. No, sir.

Q. Is the determination of that a matter or chemistry or toxicology?

A. It would first be chemistry, it must be isolated, first, but you could go out and feed it to all kinds of animals and study the effects on those animals, but you would never know what your toxic material is until some chemist isolates it and analyzes it. That must be done first.

Q. You say chemistry must come first?

A. Yes, sir, chemistry must precede toxicology if you are going to put your finger on the materials.

Now the toxicologist says, "We think it is this, we think it is that, or we think it is this, from the symptoms", but chemistry must isolate the material first

Now that statement was based on the assumption that the toxicologist had a knowledge of toxicology, you understand what I mean. I'm speaking of the one who says that we think it's this or that, but as I said a moment ago, he must find it there and than determine what type of material it is. A toxicologist would never do that. That is a chemist's job.

Q. Even in the field of chemistry, Doctor, the question I asked you just now was, "Is a toxic factor produced by the two non-poisonous factors" and you can't tell us that?

A. Now let's look at it this way; the chemist will have to isolate the material, then that material would have to be fed to animals, and that's where the toxicologist would come in.

Q. All right, sir.

A. To feed it them you would decide from these feeding experiments and from the materials which the chemist isolated, what the toxic material was. That would be the procedure which I think would be followed in isolating the materials first.

Q. But frankly, you tell us that you never tried to isolate—

A. Oh, no, I haven't.

Q. And you never tried to determine the toxic factor, whether it is in chemistry or in toxicology?

A. No, we had no reason to do that. That's right.

Q. And you frankly told us you haven't conducted or witnessed any feeding experiments with animals, have you?

A. No, sir, I have not.

Q. With trichloroethylene extracted soybean meal?

A. That's right, I have not.

Q. And you do not know, as you tell us today, what the toxic factor is, do you, Doctor?

A. No, sir, not what the toxic material is; no, that's right.

Mr. Thomas:
That is all.

The Court:
Is there any further examination of this witness?

Mr. Tavares:
Just one or two questions, if Your Honor please.

Re-Direct Examination.

By Mr. Tavares:

Q. Doctor Vaughn, in what field did you get your Ph.D. degree, in what field did you study for your thesis and so forth?

A. Physical and analytical chemistry.

Q. Physical and analytical chemistry?

A. Yes, sir, that's right.

Q. Doctor, does that have anything to do with hydrocarbons?

A. Yes, my Ph.D. research was in the field of hydrocarbons, that's right.

Q. And is trichloroethylene a hydrocarbon?

A. Trichloroethylene is a chlorinated hydrocarbon.

Q. Now Doctor, your testimony in this case, your opinions have been based on your knowledge, and in what field, the toxicology field or the chemistry field, or what field?

A. They have been based on my knowledge of trichloroethylene and the materials that occur in soybean meal, that is, I can see you could produce from those two materials. I don't think this would be very difficult at all for a chemist to see that you could produce toxic materials from those two.

Q. And on what background is that based?

A. On a knowledge of the chemical properties of trichloroethylene.

Mr. Tavares:
That is all.

Mr. Thomas:
That's all we have.

Mr. Tavares:
You may step down.

(Witness excused.)

* * * * * * * *

Mr. Thomas:
Now, if Your Honor please, as long as plaintiffs have now rested their case, and defendant Du Pont at this time would like now, and does now, if Your Honor please, move for a directed verdict at the close of the plaintiffs' case, and to save time and to save oral dictation into the record of the specific grounds of such motion made in each of the three cases, we have prepared written motions of defendant for a directed verdict in each of the three cases, which we would like to file with the reporter and with the clerk of Court to save time, if Your Honor please, setting out the various grounds, and we will give Mr. Brooks, Mr. Tavares, Mr. Burgin, and Mr. Kashiwa, copies. If the Court will permit us to do it that way; otherwise, we can dictate it in the record.

The Court:
Yes, just file it, and let's get through with it.

Mr. Thomas:

I might say that this motion in each of the three cases, asking for a directed verdict in favor of this defendant in this cause as to all counts in the complaint, or the entire complaint, if Your Honor please, and I refer to the first motion.

We would like to file with the reporter and the clerk, this prepared motion.

The Court:

All right, sir, go ahead.

(Motion for directed verdict received and filed.)

Mr. Thomas:

If Your Honor please, I believe you said we could file these?

The Court:

Yes, sir.

Mr. Thomas:

Well, if Your Honor please, we now, pursuant to the permission of this Honorable Court, now file with the reporter, in each of the three cases, a motion entitled "Motion of Defendant for a Directed Verdict," which is moved for at the close of the plaintiffs' case, and we ask for a directed verdict as to the entire complaint, and all counts therein on the specific grounds therein specifically set forth.

Do you want to hear me on this, Your Honor?

* * * * * * * *

There is a question in this case which I think would be a question for the jury, as to whether or not Du

Pont sufficiently gave warning to the Magnolia Soy Products Company, that this theory had been found full of errors, and that there was danger in this feeding. That, I think, is for the jury, and if it may become a question for the jury, I don't think it would be at this stage, but it may become a question for the jury as to whether the chemical trichloroethylene was the toxic cause of the deaths of these cattle, but in this view, Du Pont, having knowingly furnished this chemical for this use, knowing that it would go into the processes of making soybean meal, and their theory about the matter, however sincere and honest they may have been in it, proving to have been false, that is a jury issue, and the motion for a directed verdict would be overruled.

Mr. Thomas:

If the Court please, the first motion for a directed verdict made in each of the three cases, now Du Pont follows that up with a motion for a directed verdict made at the close of plaintiffs' case, asking this Honorable Court to direct a verdict in favor of the defendant in this cause as to Counts One, Two and Three of the Complaint herein and referred to as the Contract. Now the grounds are all set forth in our written motion in this regard, which we should like to ask permission of this Honorable Court to file with the reporter and the clerk instead of reading it, as we have done heretofore.

The Court:

That is all right, sir. Now as to that last motion, gentlemen, didn't you gentlemen for the plaintiff withdraw one of those counts?

Mr. Thomas:

If Your Honor please, Mr. Brooks of Counsel for the Plaintiffs, has now told this Honorable Court, I believe, as I now recall, that Count Three, which count is on the expressed warranty theory, is now withdrawn, and hence that being so, we move to delete that number, as to the expressed warranty. We intend to withdraw that, since the plaintiffs have withdrawn that count, and that is, as I understand, being done by the plaintiffs.

Mr. Brooks:

That is correct.

Mr. Thomas:

Count Three on the expressed warranty theory now having been withdrawn from this case in each of the three cases, defendant Du Pont now, therefore, wishes to delete from its motion for a directed verdict as to the dismissal of Counts One, Two and Three, the number and word "Three", inasmuch as Count Three is no longer applicable in this case, and if Your Honor please, we would like to file with the reporter such written motion setting out these specific grounds.

The Court:

All right, sir, you may do that.

Mr. Tavares:

Your Honor, at the time I rewrote this or retyped our amended complaint, I felt I ought to include that Count Three as a matter of simple regularity, and it is still in there. Does the Court wish me to leave it out in this redraft? I can have it redrafted to do that.

The Court:

Well, I think it would be very well to leave it out. I don't know that it makes any difference since you now state that it is out, but I think the record would look better if it were taken out.

* * * * * * * *

The Court:

Well, Mr. Thomas, do you have any different position about this particular motion than you had about the other?

Mr. Thomas:

None except, if Your Honor please, what we argued at Oxford on the motion for summary judgment, as Your Honor will recall, as the count now appears in the record, why it is the contract account, and we think that privity of contract is an essential consideration. It is essentially a reliance, and essentially the essence of all which we respectfully submit is missing in this case. That is the difference.

The Court:

That motion would be denied.

* * * * * * * *

FRANK McDONALD, a witness called by and on behalf of the defendants, having been duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Thomas:

Q. This is Mr. Frank L. McDonald?

A. Yes, sir.

Q. Speak out louder, Mr. McDonald.
A. Yes, sir, I am Frank L. McDonald.
Q. Where do you live, Mr. McDonald?
A. Clarksdale, Mississippi.
Q. How old are you?
A. 39.
Q. By whom are you presently employed?
A. Planters Manufacturing Company of Clarksdale.

Mr. Brooks:
What was that name please?

The Witness:
Planters Manufacturing Company, Clarksdale, Mississippi.

(By Mr. Thomas):
Q. And what is their business, Mr. McDonald?
A. They manufacture cottonseed and soybean products.
Q. For how long a period of time have you been employed by Planters Manufacturing Company?
A. Four years.
Q. And how long have you been engaged in oil seed crushing and extracting business?
A. Approximately 10 years.
Q. Approximately 10 years?
A. That's right, sir.
Q. Where did you first start such employment?
A. Delta Products, Wilson, Arkansas.
Q. Is that the name of the concern now?
A. No, sir; it is the Evadale Buckeye, that's a Procter and Gamble plant.
Q. And how long were you with Delta Products?
A. Approximately four years.

Q. And how were you employed by that concern?

A. I started out with them as plant operator; then I was plant maintenance man.

Q. Yes, sir. Now what kind of extraction method did they use, or expeller method?

A. They used prepressed operation expeller and hexane extractor.

Q. Now after you left the Delta Products of Wilson, Arkansas, where did you next come for employment?

A. Magnolia Soy, Greenville, Mississippi.

Q. That is the Magnolia Soy Products Company of Greenville, Mississippi?

A. Yes, sir, that's right.

Q. All right, sir. Do you know whether it had been incorporated as a corporation when you first came here or not?

A. I don't know that, no, sir.

Q. You don't know about that?

A. No, I don't.

Q. Now before you came to Greenville for employment with them, had you known Mr. L. L. Ford and Mr. Lyman Reed?

A. I knew Mr. Reed; I knew of Mr. Ford.

Q. All right, sir; where was the first time you met Mr. Ford, where was it?

A. I met him at a convention in Memphis, a regional meeting.

Q. Yes, sir; now do you recall the date that you arrived at Greenviell for emplloyment here?

A. The 10th of December, 1950.

Q. 1950? The 10th of December?

A. Yes, sir.

Q. In what capacity were you employed at Greenville?

A. As Plant Superintendent.

Q. What was the condition or status of the plant, with reference to its being finished, or in the process of construction, or otherwise?

A. It was in the process of construction, and about five per cent completed at the time, oh, possibly it was ten per cent completed at that time.

Q. About when was the plant of Magnolia Soy Products Company here at Greenville, completed, Mr. McDonald?

A. The latter part of February.

Q. Of 19—what?

A. 1951.

Q. 1951?

A. Yes, sir.

Q. Were you familiar at that time with a design known as the Crown Iron Works design?

A. Yes, sir, I knew of it.

Q. Had you known, were you then familiar with what is known as the Detrex, D-e-t-r-e-x design?

A. Just through magazines was all I had on that. I had seen sketches of it like that.

Q. What plant design was being used at the Greenville plant of the Magnolia Soy Products Company?

A. The Bollman design, which is a basket extractor.

Q. Now that Bollman, would you spell that, please, sir?

A. B-o-l-l-m-a-n, Bollman.

Q. It is a Bollman what?

A. It is a Bollman design, basket extractor.

Q. A Bollman design basket extractor?

A. That's right.

Q. Now who was in charge of that design?

A. Mr. Ford, as far as I know.

Q. Is that the same Mr. L. L. Ford you referred to a moment ago?

A. Yes, sir.

Q. What would you say as to that design being a standard design, or a design peculiar to Magnolia Soy Products Company, or otherwise?

A. It was largely peculiar to Magnolia. It was not similar to the ones I had seen before, only in the fact that it was a basket extractor.

Q. The record shows that a corporation known as Magnolia Soy Products Company was formed sometime in January or February of 1951; you don't know anything about the details of the incorporation?

A. Not the details; Mr. Warren just called me in and told me it had been done.

Q. Now who is Mr. Warren that you referred to?

A. Mr. Warren is James Warren, who came here from Texas and backed the building of the plant.

Q. Do you know what position he occupied with Magnolia Soy Products Company?

A. He was President of it.

Q. President?

A. Yes, sir.

Q. And what position did Mr. L. L. Ford occupy?

A. He was Vice-President.

Q. And what position did Mr. Lyman Reed occupy?

A. He was Secretary.

Q. Who had charge of sales?

A. Mr. Reed.

Q. Mr. Reed?

A. Yes, sir.

Q. And your job with Magnolia Soy Products Company was Plant Superintendent, is that correct, sir?

A. That's right.

Q. All right, sir; then how long a period of time did you remain as Plant Superintendent of Magnolia Soy Products Company, Mr. McDonald?

A. Until September 24, 1951.

Q. And where did you go then?

A. I went down to Craig Field at Selma, Alabama, to a pilot instruction school.

Q. You went to a pilot instruction school?

A. That's right.

Mr. Brooks:

Where?

Mr. Thomas:

He said he went to Craig Field at Selma, Alabama.

Q. When did you first meet, if you did meet, Mr. R. Stuart Armstrong of the Du Pont Company?

A. In the early part of 1951. I wouldn't say for sure just when, but I believe it was in January.

Q. About what per cent of the plant of Magnolia Soy Products Company was completed when you first met Mr. Armstrong, Mr. McDonald?

A. I would say sixty or seventy-five per cent.

Q. Do you recall what was the occasion of Mr. Armstrong's first visit to the plant of Magnolia Soy Products Company?

A. You mean the reason for his being there?

Q. Yes, sir.

A. To see how the distillation system was coming along, that he was more or less interested in supervising.

Q. Did you say of the distillation system?

A. Yes, sir, the distillation part of the extractor system.

Q. The what?

A. The distillation part of the extraction system.

Q. The distillation part of the extraction system, you said?

A. That's right.

Q. All right, sir; now right before Mr. Armstrong came, what effort, if any, had been made to start up the plant and the results?

A. Now do I understand you right—

Q. With reference to equipment, had any starting up processes started before Mr. Armstrong came down the first time?

A. No, we were not able to start. We hadn't finished building the plant then.

Q. I see. All right, sir, now when Mr. Armstrong came down what recommendation, if any, did he have concerning the distillation system or any part of the plant?

A. Well, some of our pumps, when he finally inspected them, were not holding the Tri, they were leaking pretty badly.

Q. Some of your pumps?

A. Yes, sir, they were leaking.

Q. You say they were leaking pretty badly?

A. That's right.

Q. Now what has that pump to do with reference to the distillation or the recovery, or the extraction system?

A. The pumps put the solvent over the soybean flakes, and then they pick up the miscella which is your oil and solvent combination, and send that on through your distillation system.

Mr. Brooks:

Your Honor, would you have the witness speak just slightly louder?

The Court:

Speak just a little louder, Mr. McDonald.

(By Mr. Thomas):

Q. Is that miscella that you referred to?

A. Yes, sir, miscella.

Q. How would you spell that, please, sir, for the benefit of me and the jury?

A. That's spelled m-i-s-c-e-l-l-a.

Q. All right, sir, now what did you say about this miscella and the pump?

A. The pumps are used to pump miscella through your filter and on through your distillation system.

The Court:

Now let me get for my benefit and the jury's, this miscella that you speak of, as I understand it, that is the oil which has come from the beans, mixed with the solvent?

The Witness:

That is correct, yes, sir.

The Court:

And that is the mixture which goes on through your distillation system?

The Witness:

Yes, sir, that is approximately an 80-20 mixture, with the 80 per cent of it being solvent, and 20 per cent of it being oil. That is not a cut and dried percentage, but we try to maintain that.

(By Mr. Thomas):

Q. Now that which you have told His Honor about is what you referred to as "miscella", is it not?

A. That's right.

Q. All right, sir; now what recommendations concerning these pumps, if any, did Mr. Armstrong make?

A. He said we should have different type pumps, which I also agreed with him myself, because the ones we had, we could not make work properly.

Q. Now what was the solvent in use at the Magnolia Soy Products plant at that time?

A. Trichloroethylene.

Q. Trichloroethylene?

A. Yes, sir.

Q. Do you sometimes shorten that as "Tri"?

A. Yes, sir.

Q. All right, sir; was that the only visit made by Mr. Armstrong to Magnolia's plant in 1951?

A. No, sir, he was down there three or four times, to my knowledge.

Q. Now what happened after the plant started up, Mr. McDonald, did anything out of the ordinary occur?

A. Well, we hadn't been running very long before the pumps started leaking, and we had a slight explosion with our toaster.

Q. Now, what do you mean by "our toaster"; what is its function, what does it perform?

A. Well, when your flakes are extracted in the extraction column, the spent flakes are discharged into a desolventizer-type toaster. The top part of your toaster, or desolventizer is used to desolventize the flakes, and the bottom part of it does your meal, and sends it on to your grinding plant.

Q. Yes, sir, and what happened to this toaster or desolventizer, Mr. McDonald?

A. Well, we had been down for a short period of time, and when we started up, charred meal got around the hub in the bottom of one of our kettles—

Mr. Brooks:

We object to that, Your Honor. It is hearsay. Apparently he is drawing a conclusion. There is no evidence to show that there was any charred meal in that extractor.

May I ask the witness one question, Mr. Thomas, just to clear this up?

Mr. Thomas:

Why certainly.

(By Mr. Brooks):

Q. Is that true, sir?

A. No, sir, it was in there because I opened it up.

Q. Did you know before the explosion that charred meal was there?

A. Not before, we didn't, no. We didn't know it was there until after we opened it up.

Mr. Brooks:

I think that clarifies it, and thank you, Mr. Thomas.

(By Mr. Thomas):

Q. And after you opened it up, what did you find?

A. We found charred meal around the hub on one of the sleeves.

Q. Now what heaters, if any, did this plant have out there?

A. We had a home-made space heater in there.

Q. A home-made space heater?

A. Yes, sir, fired by gas.

Q. And was it in use or not?

A. Yes, sir, it was in use; it was quite cold while we were carrying on that operation.

Q. Now did Mr. Ford know of its use?

A. Oh, yes.

Q. What, if anything, had Mr. Ford said about this particular heater, as to whether it should be used or not?

A. He said it would be all right, that there wasn't any danger from it.

Q. Mr. McDonald, do you recall anything being said about the use of this space heater, anything being said by Mr. Armstrong to Mr. Ford?

A. He strongly recommended discontinuance of the use of that heater.

Q. And why wasn't it discontinued?

A. Well, Mr. Ford didn't seem to think it was necessary.

Q. Now after this explosion which you referred to and about which you have mentioned charred meal being found in the desolventizer, was there any other explosions at the plant?

A. Shortly after that, there was another one.

Q. About what month in the year was it?

A. I believe it was in March, the latter part of March.

Q. Of 1951?

A. Yes, sir, 1951.

Q. Well, would you tell us about that explosion, please, sir?

A. I had gone to town and had left orders for the boys to drill a hole through the side of the extractor column. It was full of vapors at the time, and the liquid level in that particular column is only a foot or a foot and a half deep, but the column itself is about 45 feet high, and 15 feet one way, and eight feet the other, rectangular-shaped. Of course, it was full of vapors, and I was afraid to burn into the side of that column, so I had left orders for the men to

drill a hole through the side to make a connection for my miscella pump, to recirculate miscella back into the bottom of the extractor, and thereby to obtain a higher compensation; and while I was gone, Mr. Ford gave one of my men orders to cut it in there and save time, with an acetylene torch.

Q. What, if anything, had Mr. Armstrong had to tell Mr. Ford about using acetylene torches in there?

A. He told him not to use it under any circumstances until the plant was purged.

Q. And what do you mean by "purged", by the plant being completely purged?

A. Cleared of tri vapors and any presence of tri.

Q. All right, sir; now what observation did you, as plant superintendent, make as to the method of cooking the meal out there in the plant?

A. Well, to insure that there would be no urease activity, I wanted to keep that toaster up to at least 240 degrees for 20 to 30 minutes, which would ordinarily insure urease inactivity.

Q. Now did you comply with that out there, or what happened out there?

A. No, sir, we didn't keep the temperature up.

Q. Why?

A. Well, the toaster, in the first place, when they first started operations with it, we had six rings on that toaster, and they were trapped out, one trapped to two rings each, and one of the rings was not getting sufficient discharge through the traps to keep it hot like it should be. We later changed that to six traps, with one trap for each ring.

Q. What information, if any, did Mr. Ford have about these traps you speak of?

A. Well, he said it was all right, but it later proved that it was not. The traps were all right in themselves, but there wasn't enough of them.

Q. And what did you have to say about the temperature, about being able to obtain and maintain temperature, what did you say about that?

A. Well, we just couldn't do it.

Q. You couldn't do it?

A. No, sir.

Q. Now about how often were you able to obtain and maintain this temperature you spoke of for the period of time you spoke of?

A. Oh, maybe 10 per cent of the time, maybe when we were coming up with small loads.

Q. Coming up with what?

A. With small loads.

Q. Small loads?

A. Yes, sir, not to capacity.

Q. All right, sir. Now what, if anything, did Mr. Ford have to tell you, Mr. McDonald, about production, or trying to attain a certain amount of production?

A. Well, he wanted to get it up. Originally we tried to get around a hundred tons a day, but that was impossible, and then we tried to settle for around 60 to 70 tons a day.

Q. What, if any, conversation did you have, or did Mr. Ford have with you, concerning that requested production?

A. Well, he wanted to hold it up.

Q. He wanted to hold it up?

A. Yes, sir, Mr. Ford did.

Q. Did you have anything to tell Mr. Ford about that?

A. Well, we couldn't hold that production and come out with a quality product.

Q. And by "quality", you are referring to what product?

A. In particular, being able to hold our toaster up to the proper temperature for proper cooking procedure.

Q. And that proper temperature was what?

A. We always tried to maintain 240 degrees minimum at the bottom.

Q. For how long?

A. From 20 to 30 minutes.

Q. Was that continuous or sporadic or what?

A. Well, it was sporadic with us, but it should have been continuous.

Q. Now what capacity—What original capacity was the plant designed for, how many tons per day?

A. Originally, it was designed for from 90 to 100 tons a day.

Q. Now what statements, if any, did Mr. Ford make to you, Mr. McDonald, about this meal being sold for cattle feed, or did you make to him in that regard?

A. Well, I had had conversations with a consulting engineer in Memphis, and knew that it would possibly be dangerous if that meal was sold for cattle feed that there would be cattle deaths as a result.

Mr. Brooks:

I object to that, Your Honor. The witness is not qualified to express an opinion on the subject of the results of feeding that meal and it causing deaths of cattle.

The Court:

Well, I think it is perfectly competent for him to state that he had some information it was dangerous. That's all the statement he has made so far. Go ahead.

(By Mr. Thomas):

Q. Then, Mr. McDonald, what statements, if any, did you make to Mr. Ford, or he to you, about that meal being sold for cattle food?

A. I recommended to Mr. Ford and Mr. Reed and Mr. Warren that it not be sold for cattle feed.

Q. What did Mr. Ford or any one else there in your presence, tell you?

A. Mr. Ford and Mr. Reed both assured Mr. Warren that it would be all right.

Q. Mr. Ford and Mr. Reed assured Mr. Warren it was all right?

A. Yes, sir.

The Court:

Let me ask this witness a question right here for my own benefit and for the benefit of this jury.

Was your question directed to these gentlemen based on the idea that soybean meal made by the Tri processes was in itself dangerous, is that what you had heard?

A. Now let me see if I understand you. You mean when I told them it should not be sold as cattle feed?

The Court:

Yes, sir.

The Witness:

I told them that I assumed it was dangerous for cattle feed.

The Court:

Was that because it was being made with the Tri processes?

The Witness:

Indirectly, yes, sir. It had never been proven that Tri was directly the cause, but as a result of the use, there was enough evidence against using it to make me think it was dangerous.

The Court:

All right. I see what your attitude is. Go ahead.

(By Mr. Thomas):

Q. Now with reference to its use for hogs and poultry feed, and urease, did you and Mr. Ford have any conversations about that?

A. Well, for feeding, it wants to be inactive in urease, because it will cause death in chickens, if you are using it for poultry feed, if the urease is active.

Q. After this second explosion caused by the acetylene torch, you testified about, did Mr. Armstrong have an occasion to visit your plant there, after that?

A. Yes, sir, he was there.

Q. About what time, if you recall, was it that he was there.

A. It was in the latter part of March. I don't recall the exact date.

Q. In 1951?

A. In 1951.

Q. And do you recall anything about a fire in any of the beans down at the plant?

A. Yes, sir, we had a slight conflagration one morning about six o'clock; some of the meal caught fire.

Q. And what was the cause of that, what was the fire caused from?

A. Well, that was caused from the meal. The meal was sacked while it was pretty hot, and the moisture

content was high, and it had been left there for a period of over two weeks, that particular meal, and it was the stuff that had gone through the toaster, at too low a heat to warrant sending it out, what was there, and it was damaged meal anyway, and it caught fire.

Q. All right, sir, and about how many bushels, if you know, were damaged or burned?

A. Oh, I'd say 150 sacks.

Q. 150 sacks?

A. Yes, sir, that's about right.

Q. What use, if any, was made out of those burned beans or part of them?

A. The beans that were damaged and could not be processed, were ran through, and we sold them as fertilizer.

Q. Do you recall seeing Mr. Stuart Armstrong down there at the plant sometime about the first of August, 1951, Mr. McDonald?

A. Yes, sir, he was there.

Q. Do you know who he saw at that plant?

A. He saw Mr. Ford and Mr. Reed both.

Q. All right, sir; and you saw him at that time, too?

A. Yes, sir.

Q. Would you tell us whether or not you were in on a discussion of a letter, do you know anything about a letter dated July 31, 1951?

A. No, sir, I was not in on that.

Q. Now when was the next time that Mr. Armstrong made a visit to Magnolia, that you recall, after the August visit?

A. When was he next visiting us?

Q. Yes, did he make another visit after that August visit while you were still at the plant?

A. Not that I recall.

Q. All right, sir; now what was being done in the month of August in 1951, was that the month in the plant's operation when you were making Tri extracted soybean meal or not?

A. No, sir, we were running out the bad beans.

Q. You were running out what?

A. The bad beans, the beans that had got damaged or burned, we were running them out for fertilizer. Those that were all burnt up, you know.

Q. And selling it as what?

A. Selling it as a fertilizer.

Q. You were selling those burned beans as fertilizer?

A. That's right.

Q. And you left, I believe you testified, to go to Craig Field when?

A. On the 24th of September, as near as I can remember.

Q. Did you personally know, not what you heard, but did you personally know of any other matter occurring at the Magnolia Soy Products Company after you left?

A. There was another explosion and fire, the first of November.

Q. Now did you talk to Mr. Ford about that explosion and fire, or to Mr. Reed, or to anyone else?

A. No, sir, I didn't talk about it. I came back before that.

Q. You came back along after it happened?

A. The next day.

Q. You got back to the plant the next day after this last explosion and fire?

A. Yes, sir.

Q. Do you know what happened out at the plant?

A. There was another explosion at the plant.

Q. There was another explosion?
A. Yes, sir, in the extraction column.
Q. The extraction column?
A. Yes, sir.
Q. You saw that, did you?
A. I saw it after it had been done, yes, sir.
Q. Did anybody get hurt?
A. A man got killed.
Q. Do you know the nature of the equipment after that explosion, what happened to it, whether it was damaged or not?
A. The extractor column was ripped wide open.
Q. Mr. McDonald, are you familiar and were you familiar then, with a magazine or trade journal called "Feed Stuffs"?
A. Yes, sir, we received that magazine.
Q. By "we", do you mean Magnolia Soy Products Company subscribed to that magazine?
A. Yes, sir.
Q. Now in the year 1951, they did?
A. Yes, sir.
Q. All right, sir; now do you know whether or not Magnolia Soy Products Company subscribed to another magazine known as "Soybean Digest"?
A. Yes, sir, we had that one there, too.
Q. Do you recall whether any article or p cture appeared in that magazine with reference to Magnolia Soy Products Company?
A. No, sir, I don't recall about that.
Q. All right, sir; now during the time you were plant superintendent of Magnolia Soy Products Company, what labels did Magnolia have, if any, on its soybean meal, concerning its use or not, as cattle feed.

A. None, as I recall. They just used the standard label giving the fat content and the protein content, and so forth, and the fact that it was a solvent extracted product.

Mr. Thomas:
That is all, if the Court please.

The Court:
Very well, sir. You may cross examine.

Cross Examination.

By Mr. Brooks:

Q. Mr. McDonald, prior to going with the Magnolia Soy Products Company in December of 1950, had you worked with any other processing meal plant that used the tri as a solvent?

A. No, sir.

Q. Had you ever been through such a plant?

A. No, sir.

Q. Did you actually see the Crown Iron Works?

A. No, sir.

Q. Did you see it in operation?

A. No, sir.

Q. So actually when you went to Magnolia Soy Products Company, you had no previous experience whatever with regard to the Tri processes, had you?

A. No, sir, that's right.

Q. You were there in December of 1950 for the purpose of assisting in the construction of this plant?

A. Yes, sir.

Q. Now during that period, from December until the plant actually went into operation, did you make any suggestion as plant superintendent, with regard to the equipment that was being installed there?

A. Yes, sir.

Q. Prior to the plant's actually going into operation?

A. Yes, sir, that's right.

Q. I see. Now you said that the Magnolia Soy Products plant was peculiar, that the equipment was peculiar to that plant, now if you hadn't seen any other Tri plant, on what do you base your opinion, that the Magnolia plant was exceptional or peculiar?

A. Well, I had access to drawings and sketches of other plants that were using that type extractor that we used, and the entry system was not anything like what other basket extractors used. That is what I had reference to in particular.

Q. Well, what other plants, drawings of what other plants, did you have reference to?

A. Well, French,—French Machinery makes a basket extractor,—French Oil Mill Machinery.

Q. What did you do about the pumps that you have testified were leaking, prior to going into production?

A. Nothing prior to going into production. It was after we got in production.

Q. How long after?

A. I'd say about a month or six weeks.

Q. A month or six weeks?

A. Something like that.

Q. You actually were in production and the pumps were still leaking?

A. Yes, sir.

Q. Now those pumps, were they affecting the heat?

A. Would they affect the heat?

Q. Would the leaking pumps have anything to do with the quality of the meal?

A. I would say not, no, sir.

Q. That's what I thought.

A. The only way they would have,—Let me modify that statement this way; the leaking pumps would leak enough solvent to where you could not hold your concentration like you wanted, and maybe get your oil content like you wanted. That would be all, it would have nothing to do with the meal being toasted, or anything like that.

Q. Then it wouldn't have anything to do with the meal itself?

A. No, sir.

Q. Now, you have mentioned a space heater. Did that have anything to do with the operation of the mill?

A. Not on the production end at all, no, sir, nothing.

Q. It had nothing whatever to do with the production of meal?

A. That wasn't, no, sir.

Q. That was a matter of personal comfort, was it not?

A. Well, it had only to do with safety, that's all.

Q. Now you state that the heat should be 240 degrees, I assume that is Fahrenheit?

A. Yes, sir, that's right.

Q. On what do you base that experience?

A. That was from previous experiences in that field.

Q. Why, didn't you just say you had no previous experience with Tri?

A. Not with Tri, but I have had experience with hexane, which is very similar.

Q. Why did you say 240 degrees would have to be maintained, 240 degrees in this particular process?

A. To make sure the urease activity is made inactive.

Q. Do you consider the urease activity an indication of the heating of that meal?

A. Absolutely.

Q. It would be an indication of the heat, wouldn't it?

A. That's right.

Q. All right, sir. I show you Plaintiffs' Exhibit No. 11. Now this has been introduced in evidence, and I'll ask you to please read at the bottom of the page, of the Whitten-Tenent Laboratory Report on Magnolia Soy Products meal; what is that statement right there, Mr. McDonald?

A. "Urease activity negative indicates meal has been properly cooked".

That's just what I told you.

Q. Now according to what you have just said, that meant that the heat had to be 240 degrees, is that true?

A. Not necessarily. That is what we try to maintain. It could possibly be a little less, but that assures urease inactivity.

Q. Well, if it were a degree or two, but the heat itself had to be approximately 240 degrees, and if they had not maintained it at that figure, why this statement would not have appeared, because the urease would have shown in the test, wouldn't it?

A. That's right, for that particular time. Now that may be for just a 24 hour operation.

Q. Yes, sir. Now with regard to the second explosion; you gave the order to burn that hole in that column, did you not?

A. No, I did not. I gave the order for it to be drilled through the side with a drill, with oil kept on the drill, soybean oil, to be specific.

Q. Weren't you present at the time that that hole was made in that extractor column?

A. No, sir, I was not, but I had left orders for it to be drilled through the side with oil kept on the drill. I had gone to town.

Q. Didn't you testify in the Ladner case that: "We were burning a hole in that pump"?

A. Absolutely not.

Q. Now with regard to the traps, how many steam traps did you have when the plant went into operation?

A. Three.

Q. And your recommendation was what?

A. To put individual traps on each ring.

Q. That would be how many traps?

A. Six.

Q. Six?

A. Yes, sir.

Q. And if six traps were installed, didn't you make the statement that you could maintain the proper heat, or at least the heat you considered proper?

A. Yes, sir, if we put through the proper tonnage.

Q. Weren't those additional traps installed?

A. Yes, sir.

Q. And after the installation of these traps, was the proper heat maintained?

A. Not always.

Q. In other words, after your recommendation as to the steam traps had been carried out, and you said in your opinion as the plant superintendent, you could maintain those heats or what you considered appropriate heats, yet after they were installed then you still say now that you could not get the heat you desired and maintain it?

A. Not always, because we tried to put through more than it would take. In other words, we increased the capacity

Q. Well, didn't you know at the time that you recommended the six traps this would be done?

A. Well, absolutely, and I told the people about it, and I told Mr. Ford, he knew about it, and I told Mr. Reed we couldn't increase the capacity and maintain the heats.

Q. But your recommendation was carried out, sir, wasn't it?

A. Yes, sir, over their objections.

Q. But it was done, that's the important part.

A. That's right.

Q. Now will you state at approximately what time those traps were put in, the additional steam traps?

A. I would say we tried to operate three to four weeks before that was done.

Q. But it was done in March, is that right?

A. I would say so.

Q. Approximately, before the end of March?

A. Yes, sir.

Q. But it was very early after the plant went into production, was it not?

A. Yes, sir.

Q. Now you have stated again with regard to heat, that you considered 240 degrees Fahrenheit necessary, why do you say that?

A. That had been my experience in the way I had been taught on a hexane operation.

Q. Well, now we are talking about the Tri method. You know that?

A. That's right.

Q. Well, what effect would it have on the meal if you maintained a temperature of 240 degrees, what did you expect to gain by that?

A. I expect that we would have inactive urease.

Q. You have what?

A. I expected we would have inactive urease.

Q. Inactive urease?

A. Yes, sir, the urease would be negative in the meal.

Q. Is your statement in regard to heat connected in any way with the residual Tri?

A. Not necessarily. I would say it would be out there, that there would be no Tri in the meal.

Q. Did you say out there?

A. I meant out of there, and there would be no Tri in the meal.

Q. Could you say that a temperature of 240 degrees would remove all of the Tri from that meal?

A. I would say that it would; whether it actually does or not, I wouldn't say.

Q. Would you say that if it were slightly lower than that, say 225 degrees, that there would be residual Tri in the meal?

A. No, sir, I wouldn't say that.

Q. You wouldn't say that?

A. No, sir.

Q. Do you know whether residual Tri in meal in any way is harmful to cattle?

A. I wouldn't know about that.

Q. You wouldn't know whether in the processing of this meal, it was important in the quality of that meal to have the Tri residual eliminated, if possible?

A. Yes, sir, I would say it was important to have it out of there.

Q. Why?

A. That it might be well on account of explosion purposes, or what I mean, heat purposes.

Q. Now the residual Tri in the meal, you mean?

A. Well, not from a danger standpoint that way.

but it would not be good to have it in the meal itself.

Q. Why not?

A. Well, I wouldn't know about that, except we just try to recover the Tri.

Q. I thought so. Now you made a statement that the meal should not be sold for cattle food?

A. That's right.

Q. Now on what do you base that opinion?

A. Well, I had heard there had been deaths of cattle from trichloroethylene meal being fed them.

Q. Due to what factor?

A. That I don't know.

Q. Was it because the meal had not been heated at 240 degrees?

A. No, sir, I wouldn't say.

Q. Was it due to the residual Tri in the meal?

A. I wouldn't say that either.

Q. So you don't know?

A. That's all I do know.

Q. That's correct, you don't know the reasons at all, do you, Mr. McDonald?

A. No, sir.

Q. I thought so. Now the burned beans were not used in any way in producing meal for sale for cattle feeding purposes, were they?

A. No, sir. Not to my knowledge.

Q. They were all gotten out of there, were they not?

A. They were used for fertilizer, as far as I know, it was all used for fertilizer, all the beans that were burned.

Q. All of these beans that were damaged or burned in this fire which you have spoken of, were used for the manufacture of fertilizer, is that correct?

A. As far as I know, it was, yes.

Q. When did you return to Greenville after you left there in September, Mr. McDonald?

A. In October.

Q. That was September of '51, I think that you left, about the 22nd of the month?

A. The 24th I believe is right.

Q. The 24th of September, 1951?

A. Yes, sir, I believe that is correct.

Q. Now when did you return?

A. I returned in November.

Q. In November of 1951?

A. That is right.

Q. So you were not present at the time of the explosion, the October explosion that you just referred to?

A. You mean at the November explosion, the third explosion?

Q. Well, now what was the date of that explosion? I thought it was in October.

A. I believe it was the first.

Q. I didn't hear what you said.

A. I said that was the first of November.

Q. What date?

A. I believe it was the first of November.

Q. And you returned on what date?

A. I returned on the next day after the explosion.

Q. So your testimony as to the cause of that explosion is entirely hearsay, is it not?

A. Well, it's from what I heard, yes.

Mr. Brooks:

If the Court please, we ask that that part of the witness' testimony be excluded on the ground that it is pure hearsay.

The Court:
Well, I don't recall that this witness gave us any cause for that third explosion. He merely said a certain piece of machinery there was split wide open. I don't think that he undertook to say what the cause was.

The Witness:
I didn't reiterate what it was.

(By Mr. Brooks):
Q. Now please correct me if I am wrong. Didn't you state it was due again to the use of a torch?
A. I did not.
Q. You didn't?
A. No, sir.

Mr. Brooks:
Then I withdraw the objection.

The Court:
Now this witness hasn't told us what caused that explosion.

(By Mr. Brooks):
Q. You were familiar with the manner in which Tri was shipped to Magnolia Soy Products Company, were you not?
A. Yes, sir.
Q. In what form was it shipped?
A. In drums.
Q. In drums?
A. Yes, sir.
Q. Did you ever know of a drum to have a label upon it?

A. None other than the fact that it was trichloroethylene.

Q. None other than what?

A. That it was trichloroethylene.

Q. And that's all?

A. That's the only thing I ever saw in the way of a label on those drums.

Q. You never saw anything other than a label stating that it was Tri?

A. That's right.

Mr. Brooks:

That is all, sir.

Mr. Thomas:

We have no further questions, Your Honor. You may come down, Mr. McDonald.

(Witness excused.)

Mr. Thomas:

The plaintiff is through with this witness, and the defendant is through with him, I believe, and if Your Honor please, we will excuse the witness at this time.

The Court:

Very well. Whom will you use next?

Mr. Thomas:

If the Court please, the defendants call as their next witness, Mr. R. Stuart Armstrong.

R. STUART ARMSTRONG, a witness called by and on behalf of the defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Thomas:

Q. This is Mr. R. Stuart Armstrong?

A. Yes, sir.

Q. I believe you spell your name S-t-u-a-r-t?

A. That's right.

Q. I believe you are generally known as "Stuart Armstrong"?

A. Yes, sir, that's correct.

Q. Where do you live, Mr. Armstrong?

A. In Wilmington, Delaware.

Q. With what firm or concern are you connected?

A. The E. I. Du Pont De Nemours Company.

Q. That oftentimes is called the Du Pont Company, or Du Pont?

A. Yes, sir.

Q. That is the same as the defendant in these cases, is that true?

A. Yes, sir.

Q. And for how long a period of time have you been connected with the Du Pont Company?

A. Approximately seven and one half years.

Q. What colleges are you a graduate of, and what degrees do you have, Mr. Armstrong?

A. I'm a graduate of Purdue University.

Q. With what degree?

A. A B.S. in Chemical Engineering.

Q. And a B.S., of course, stands for Bachelor of Science?

A. Yes, sir, Bachelor of Science.

Q. In Chemical Engineering?

A. In Chemical Engineering, yes, sir.

Q. And what was the year of your graduation?

A. I graduated in 1941.

Q. Now after your graduation, with whom did you go to work?

A. The Gulf Research and Development Company.

Q. And you were with them how long?

A. Approximately eleven months.

Q. And who was your next employer?

A. I then went into the naval service, in the Naval Reserve on active duty.

Q. On active duty?

A. Yes, sir.

Q. And how long did you serve in the Navy?

A. About four years.

Q. How were you separated, Mr. Armstrong?

A. I was separated in 1947.

Q. With what rank?

A. As Lieutenant.

Q. Now after your return from the Navy, with what company did you associate yourself?

A. At that time, I went with the United States Hoffman Machinery Corporation, Syracuse, New York, as Chemical Engineer.

Q. As Chemical Engineer?

A. Yes, sir.

Q. And for how long did you work with them?

A. That was about two years.

Q. When did you first make your connection with the Du Pont Company?

A. In May of 1949.

Q. And you were stationed where?

A. First at Niagara Falls, New York, in the Chlorine Products Division Service Laboratory.

Q. Mr. Armstrong, are you familiar with the chemical compound known as trichloroethylene?

A. Yes, sir, I am.

Q. Is it sometimes spelled by leaving off the second "o"?

A. Yes, sir.

Q. Leaving it trichlorethylene?

A. Yes, sir.

Q. And is it commonly abbreviated as what?

A. As Tri.

Q. As Tri?

A. Yes, sir.

Q. Now how long were you in the laboratory in Niagara Falls, New York?

A. About six months.

Q. Then what department—You told us that was the Chlorine Products Division. Now what department were you in?

A. Well, that is the Electrochemical Department of Du Pont.

Q. And how long were you there at Niagara Falls, Mr. Armstrong?

A. About six months.

Q. And from there, where did you go, and in whose employ?

A. Well, I was transferred to the Electrochemicals Department in the Cincinnati District Office, Sales Office, as a Solvents Technical Representative for field work.

Q. And how long did you remain at Cincinnati?

A. I remained there about two years.

Q. Where did you go from Cincinnati?

A. From Cincinnati, I went to Wilmington, Delaware, where I am located now.

Q. You are in Wilmington, Delaware?

A. Yes, sir, that's where I reside now.

Q. Then you consider Wilmington, Delaware, your home?

A. That's right, sir.

Q. Have you been continuously located in Wilmington, Delaware, since you left Cincinnati?

A. Yes, sir, I have been in the Electrochemicals Department in Wilmington, Delaware, but I had different assignments with them in Wilmington.

Q. And what divisions of the Electrichemical Department were you assigned to at Wilmington, Delaware, Mr. Armstrong?

A. When I left Cincinnati, I was assigned to the Chlorine Products Division, in January of 1951.

Q. And what was your status or capacity that you were assigned at Wilmington?

A. Well, I was still a Solvents Technical Representative.

Q. Now that Solvents Technical Representative, now that is what you said your status was, is that right, sir?

A. Yes, sir.

Q. Is Wilmington, Delaware, the home office or general office of the Du Pont Company?

A. It is, yes, sir.

Q. Now how long did you remain in that position as Solvents Technical Representative?

A. I remained in that job until about August of 1953.

Q. Who was your superior from the time you went to Wilmington until the last date that you mentioned in 1953, who was your superior?

A. Mr. C. B. Shepherd.

Q. Was that Mr. Claude B. Shepherd?

A. Yes, sir.

Q. And what position did he occupy during all that time?

A. He is the Manager of the Chlorine Products Division of Electrochemicals Department.

Q. Do you know whether or not he has remained in that position even to this time?

A. Yes, he has, sir.

Q. All right, sir; now were you familiar, Mr. Armstrong, with a firm or corporation known as Magnolia Soy Products Company of Greenville, Mississippi?

A. Yes, sir, I was familiar with them.

Q. When did you first come in contact with Magnolia Soy Products Company, which I will refer to as Magnolia for short?

A. I first came in contact with them in about the middle of January of 1951.

Q. Of 1951?

A. Yes, sir.

Q. And about how long was that after you had been transferred to Wilmington, Delaware, from Cincinnati?

A. Well, I was transferred there at the very first of January, January 1, and I imagine I reported on about the second, and so that would be at least two weeks after I had been at Wilmington.

Q. And what information, if any, did you have about a plant being constructed down at Greenville, Mississippi, by Magnolia, or by L. L. Ford Associates; did you have any awareness of that at all?

A. Well, I just knew there was one being constructed. I knew very little about it. I had been told about it by my predecessor, but I knew very little about it.

Q. Yes, sir; now prior to your first visit to Greenville to Magnolia, had you known either Mr. L. L. Ford or Mr. Lyman Reed?

A. No, sir. I didn't know either of them.

Q. What was the purpose of your first visit to Greenville, Mr. Armstrong?

A. Well, in line with my duties as a Solvents Technical Representative, we had been asked to visit Greenville to assist with the prospective use and handling of our solvent, trichloroethylene, and we went down for that purpose.

Q. And what was the purpose of your visit to Greenville at that time, was it, as you say, to look into this proposed plant?

A. Yes, sir, that's right.

Q. Now when you first came to Greenville then on that visit, about what per cent of the plant was completed, would you say?

A. Oh, it was 75 or 80 per cent completed, I would say.

Q. How did that visit and the purpose of your visit conform or square with the practice of Du Pont Company on procedures; was it usual or unusual to make such a visit?

A. It was usual. It was the common practice for the technical representative to make such a visit.

Q. Technical representatives with the Du Pont Company?

A. Yes, sir, I am speaking now for the Du Pont Company.

Q. With reference to what department?

A. Well, I first spoke of my own department, the Electro-Chemicals, but I know that it is common practice within the company as a whole, to offer technical service with the use or prospective use of their product, of their chemicals.

Q. Now after your first visit that you said was made in January of 1951, when was your next visit to Magnolia?

A. It was in February, I believe it was, when I arrived there, as I recall now on February 23, 1951.

Q. Tell us, please, sir, whether the plant was in operation at that time, or not?

A. It was not in operation the day I arrived, but they tried the initial operation, I believe, the second day, the first day after I had gotten there; they just started it up.

Q. When was your next visit to Magnolia?

A. Well, I stayed there until almost the beginning of March. Then I took a three day trip away from Greenville to make another service call, and I came back in early March, I think it was March 7 when I got back to Magnolia—That would be the third visit, you could say.

Q. Now after that visit, what communications, if any, did you have from any official or officials of Magnolia?

A. Well, on March 18, Mr. L. L. Ford telephoned me at my home. I remember it was on a week-end, and he told me they had had an explosion within the extractor unit of their solvent plant.

Q. Well, what occasioned that telephone call, why did he have to call you?

A. Well, he told me they had been burning on the base of the extractor with some sort of a torch or cutting torch, some sort of a burner, and at any rate, it was a high temperature torch.

Q. All right, sir; tell us please, sir, what information, if any, had you given Mr. Ford before that time as to the use of torches in there?

A. We had warned him verbally and also given him literature pointing out the possible hazards of

subjecting trichloroethylene under certain conditions to high temperatures. The specific piece of literature that we gave, that perhaps described this best, was the "Underwriters' Lab Card" which gave the physical or the combustion properties of trichloroethylene, and warned against subjecting it to high temperatures.

Q. Now what was the purpose of Mr. Ford's telephone call to you then?

A. Well, he said he was in need of some technical assistance concerning this incident, and he wanted me to come down and talk to him, and the other officers of Magnolia about it.

Q. Were you able to go at that very time?

A. Not right away. I had got an attack of the flu, as I recall it, but I went down about ten days later, when I had recovered. I did get down there.

Q. When you went down there, during any of your visits to Magnolia in 1951, Mr. Armstrong, what occasion, if any, did you have to notice any space heaters in the building?

A. Well, there was a space heater there from the very time of the starting of the plant, an open flame space heater, that I continually warned them about. It was in about eight feet of the extraction unit, and very likely the trichloroethylene vapors were in the area of the space heater.

Q. Do you recall what—

A. I was just going to add that I saw that space heater during all of the times I was there, and I told the representatives of the plant that the manner in which it was being operated was dangerous.

Q. And you stated that you talked to some of the officials of the plant; do you recall talking to Mr. Ford, Mr. I. L. Ford about it?

A. Well, he was the one I talked to mainly about it, although I also mentioned it to Mr. Lyman Reed. Mr. Ford was in the plant more than the others.

Q. What assurance did he make concerning this space heater after you asked him to get it out of there?

A. He was very noncommittal and evasive on it.

Q. Now you told us, after you had your attack of flu, that you came down to Greenville to the Magnolia plant again?

A. Yes, sir, I did. I visited there in late March.

Q. When was the occasion of that next visit, Mr. Armstrong, after your late March visit?

A. Well, the next time I visited Magnolia was in early May.

Q. And what was the occasion of this visit?

A. Well, I had, since my late March visit, at which time they repaired the plant and returned it to operation, and it had some difficulty in the solvent recovery, and they called to ask me to come down to assist in the solvent recovery processes, that was the purpose of the visit.

Q. Did you go then in May to visit the plant?

A. Yes, sir, I was there about three days in early May, working on it.

Q. Do you know Mr. Frank F. McDonald, the gentleman who left the witness stand a moment ago?

A. Yes, sir, I know Frank.

Q. Did you see Frank McDonald on the occasion of your visit to Magnolia plant in Greenville in 1951?

A. Yes, sir, he was there on each of the visits up to this time. I talked to him on each visit.

Q. Mr. Armstrong, what connection did you have concerning any research program that Du Pont might have had with the University of Minnesota,

concerning the hemorrhagic diseases of cattle from feeding tri extracted soybean meal?

A. I was one of Du Pont's representatives sent up to the University of Minnesota for the initial conferences, and on arriving there, we set up a research program that might determine the cause of this mysterious disease.

Q. And do you know whether plans were finally made and agreed upon when you made your first visit?

A. No, sir, they were not. There was some conflicting reports at that point. That was not until some time later that plans were finalized for the program.

Q. You say there were some conflicting reports as to what?

A. Oh, as to cattle diseases.

Q. Now what part, if you know, did Du Pont have in contributing to this University of Minnesota research plan or program?

A. Well, they contributed a lot of money to it.

Q. Do you recall any other concerns that, national concerns or otherwise, that likewise made contributions?

A. Yes, sir, I recall some other concerns, some big soybean processors like A. E. Staley Company, up in Decatur, Illinois. They contributed quite a large sum of money. Funk Brothers Seed Company, Bloomington, Illinois, Crown Iron Works Equipment Company, they made some small trichloroethylene extraction plants, and they contributed, and a couple of smaller soybean processing plants also contributed.

Q. What occasion did you have, Mr. Armstrong, to visit with the Food and Drug Administration of Washington, D. C., concerning this projected program at the University of Minnesota, and experiments being conducted there?

A. I went down there in June of 1951 to discuss this matter with them, that is, the hemorrhagic disease of cattle.

Q. And that was, you say, in June of 1951?

A. Yes, sir, it was the middle of June. I think it was June 14, actually, 1951.

Q. And what do you know of your own knowledge, whether it was after you talked with them, that the program was finally completed in July with the University of Minnesota, to give the experiments?

A. Yes, sir, it was after my visit to the Food and Drug Administration, because I recall asking the officials of the Food and Drug Administration what they thought of our, not our, but the program tentatively set up at the University of Minnesota. It had not been finalized at that point.

Q. Mr. Armstrong, there has been introduced in evidence in this case, a letter dated July 31, 1951, written by Mr. C. B. Shepherd, Manager of the Chlorine Products Division of Du Pont, addressed to Magnolia Soy Products Company, or to Mr. Lyman Reed, Sales Manager. That being exhibit P-35 in this case.

Are you familiar, Mr. Armstrong, with such a letter thus described by me a moment ago, regardless of what exhibit number or not, are you familiar with the letter dated July 31, 1951, written by Mr. Shepherd to Mr. Lyman Reed, Sales Manager of Magnolia?

A. Yes, sir, I am.

Q. Who wrote such a letter?

A. Mr. C. B. Shepherd.

Q. And is he the same man who was your superior in the Chlorine Products Division?

A. At that time, he was, yes, sir.

Q. I hand you this letter just referred to a moment ago, Mr. Armstrong, and ask you by whom that letter was delivered?

A. I delivered this letter in person myself.

Q. At whose request?

A. At Mr. Shepherd's request.

Q. And how did you deliver the letter?

A. I delivered it in person, right to Mr. Reed, and Mr. Ford was also present.

Q. When you say "Mr. Reed", and also Mr. Ford, you mean Mr. Lyman Reed and Mr. L. L. Ford, officials of Magnolia?

A. Yes, sir.

Q. And you delivered that letter to both of them?

A. Yes, sir.

Q. Do you recall what date you delivered that letter?

A. I delivered that letter on August 3, 1952.

Q. And where did you come from in your delivery of that letter, what place?

A. I had just delivered a similar letter to the Thompson Soya Mill in Hiawatha, Kansas. I had just come from there.

Q. You say that was the Thompson Soya Mill?

A. Yes, sir, at Hiawatha, Kansas.

Q. What did you state with reference to a letter delivered to them, was that letter or not similar to the one that you have in your hand?

A. It was identical except for the address.

Q. And you say you had immediately come from Thompson Soya Mill at Hiawatha, Kansas, to Magnolia at Greenville?

A. Yes, sir.

Q. Now to whom else, sir, had you delivered, if anyone else, a similar letter before you came to Magnolia?

A. Before I came to Magnolia, I delivered a similar letter to the North Dakota Mill and Elevator Company up in Grand Forks, North Dakota, and to the Farmers Cooperative Elevator Association, of Blooming Prairie, Minnesota, and then to Thompson Soya Mill at Hiawatha, Kansas, and then this one here at Greenville to Magnolia Soy Products Company.

Q. And did you make other deliveries to anyone else after you left Magnolia?

A. Yes, sir, we delivered this letter to all known users of trichloroethylene for soybean extraction, that is, for the use of this solvent in the extraction of soybean meal, that is to say, soybean extraction, you understand.

Q. What instructions, if any, were given you by Mr. C. B. Shepherd, your superior, concerning the delivery of that letter, or any message connected therewith?

A. Mr. Shepherd told me to be sure that that letter was delivered to the persons to whom it was addressed, and that he paid attention to it. He told me to stress the importance of this letter, and he also told me to pass along whatever information we had at that time on hemorrhagic disease and the research program at the two schools that were working on it at that time, that is Iowa State College and the University of Minnesota.

Q. Yes, sir; now at the time you delivered the letter to Mr. Reed and Mr. Ford of Magnolia, do you know whether or not any definite factor had been isolated as one causing the death or injury to cattle?

A. No definite factor had been determined then, nor has any been determined today.

Q. Now when you delivered that letter to Mr. Reed and Mr. Ford, what was said by any and all of you at that time?

A. Well, at the time I delivered this letter, their plant was shut down, they were not using the solvent plant. They had no suitable beans. They had heard of these outbreaks in the North, and they were very much concerned over this letter, because as they stated to me, they were in bad financial shape, and they had planned to sell their plant, but with this letter, plus the recommendation in this letter, plus the information coming down from the North on those disease outbreaks, they didn't think their chances of selling the plant would be very good. They felt it would be difficult to sell it.

They also advised that in line with Mr. Shepherd's suggestions, that should they resume operations, they would investigate the possibility of selling this meal to swine and poultry raisers, to be used as feed for those animals, as outlined in the letter.

Q. Now tell us whether or not there was any instruction given you by Mr. Shepherd, other than the ones you told us about a moment ago, were those all the instructions given you by Mr. Shepherd?

A. Yes, yes, sir.

Q. Now Mr. Armstrong, there has been testified in this case through Mr. Ford, by his deposition that on the occasion of the delivery of this letter of July 31, 1951, that Mr Ford said that he told you "Here you have let us spend $500,000.00 building this mill, and now you tell us we can't use it to manufacture feed". Did Mr. Ford make such a statement to you?

A. No, no.

Q. Did he make any statement that might be reasonably interpreted to be the same or similar to that?

A. No, I don't recall it.

Q. And it has been further testified by Mr. Ford in that same deposition, that you then said, "The reason I brought it to you personally, was because I didn't want you to get excited about it". Did you make such a statement?

A. No, I didn't.

Q. Did you mak a statement that might be reasonably interpreted as being similar to it or equivalent to it?

A. No, I am sure I didn't. I wanted him to be concerned about that letter.

Q. Now, Mr. Armstrong, Mr. Ford, in that same deposition, further testified that, "90 per cent of our business is cattle feed, and we can't sell a car a year other than for cattle feed, and now you tell us not to sell any more for cattle feed", and that you replied, "I didn't say that".

Q. Did you make that statement attributed to you by Mr. Ford, that "I didn't say that"?

A. No, sir.

Q. Or anyone that is equivalent to it or similar to it?

A. No, sir, I am sure I didn't.

Q. Did Mr. Ford make any statement as stated that "90 per cent of our business is cattle feed, and we can't sell a car a year other than for cattle feed, and now you tell us we can't do that"?

A. No, I don't recall any such statement.

Q. Or any statement similar to that, or which might be reasonably construed to be the same as the one I have just read?

A. No. They weren't operating at that time. They didn't think they would be.

Q. And why were they not operating, what was the trouble there?

A. Well, they had run out of beans, and their credit was bad, and they couldn't buy more beans at that time.

Q. And Mr. Ford, in his same deposition, has further said or testified that he asked you: "Does the Du Pont Company know we can't operate our mill, and have built one here that cost us $500,000.00, if we can't sell it for cattle feed, we can't operate it." Did he say that?

A. No, sir.

Q. Did he further say, "Does Du Pont tell us to shut it down, do they have any evidence", was that said by Mr. Ford on that occasion, Mr. Armstrong?

A. No.

Q. Or any other statement by Mr. Ford that might be construed to be the same or equivalent, and did Mr. Ford make any such statement?

A. No, he did not. They indicated that they were going to look into the possibility of selling it to the poultry and swine outlet.

Q. Now Mr. Ford further said in his deposition, that you then told him, "No, there isn't any evidence conclusive, there are rumors circulating from time to time". I'll ask you whether or not you made that statement or any wording similar to that statement?

A. I absolutely did not.

Q. Mr. Ford in the testimony of that deposition further has testified that he told you at that time that, "We couldn't operate unless we did sell it for cow feed", and that you, Mr. Armstrong, knew it was going to be used for that purpose, and that is with reference to the 23rd of November, 1951, sale.

Did Mr. Ford make that statement, or did you make that answer?

A. No, sir, not at all.

Q. Did you know or have any idea it was going to be used for cow feed?

A. I did not. I had no idea whatsoever that it was.

Q. And did Mr. Ford make the statement that you knew it was going to be sold for cattle feed?

A. No, not to me.

Q. And that he told you, "He couldn't sell it", or I will read his exact words, "I told Mr. Armstrong that we could not operate unless we did sell it for cow feed"; Mr. Armstrong, did Mr. Ford make that statement to you?

A. No.

Q. Or words that might be either said to be the same as that statement?

A. No, sir, I'm sure he didn't.

Q. Now on the occasion,—on this same occasion when the letter was delivered, Mr. Ford testified that you, Mr. Armstrong, expressed the opinion that so far as you knew there was not any evidence that trichloroethylene extracted meal had anything to do with the cattle losses, and I'll ask you did you make that statement?

A. No, we didn't,—I didn't. We did not detract from that letter of Mr. Shepherd.

Q. Now Mr. Armstrong, did Mr. Ford ask you this question: "I asked him point blank if Du Pont would recommend our closing the plant down because we couldn't sell it for cow feed", and it is said by him that you said, "They did not". Did Mr. Ford make that statement, and did you make that answer, Mr. Armstrong?

A. No, sir.

Q. Or words similar to that or equivalent to it?

A. No.

Q. Now Mr. Armstrong, at your visit to Greenville on August 3, 1951, to deliver the letter you referred to, did you have after that, or I'll put it this way, did you receive after that, any kind of communication by telephone call from Mr. Reed or Mr. Ford of Magnolia?

A. Yes, sir, on November 1, I received a telephone call from Mr. Lyman Reed.

Q. What was the purpose of that call, or what information was given you by Mr. Lyman Reed?

A. Mr. Reed informed me that they had just about forty minutes before that, had another explosion of their extractor and that a man had been gravely hurt, and actually the purpose of this call was to ask that we withhold shipment temporarily of a carload of solvent that he had ordered sometime before.

Q. Was that solvent trichloroethylene?

A. Yes, sir, it was trichloroethylene.

Q. Was there any further inquiries by Mr. Reed at that time?

A. No, he was shaken up at the time of the call, naturally, because of the explosion, as it was just a few minutes after it, and that's all there was to it.

Q. Do you know whether or not Magnolia got this shipment of trichloroethylene in that same month of November, 1951?

A. I don't have specific knowledge of how the orders of trichloroethylene were handled, but it is my understanding from the records, that they received it that month.

Q. What if anything was said by Mr. Reed in that phone conversation to you concerning whether he was

familiar with the resolution of the American Feed Control Official Association concerning Tri extracted soybean meal, that is used for cattle feeding; did he say anything about that?

A. No, he didn't talk about anything except the explosion in that conversation. We had a conversation later on, though.

Q. About how much later on?

A. Oh, he called me later in the month to ask where that solvent was, and I told him I would pass his request on to the commercial people, which was done, but after that matter was taken care of, I asked him if he was aware of the American Feed Control Official resolution.

Q. Concerning what?

A. Oh, concerning the labeling of trichloroethylene extracted soybean meal, prohibiting its use for cattle feed, and cows of any sort.

Q. What did Mr. Reed say to that?

A. He told me he was aware of it, that he had read it.

Q. And that was told you in that same month of November, '51?

A. Yes, sir, November 23rd, when he called me up about the solvent.

Q. Are you familiar, Mr. Armstrong, with the magazine or trade journal called "Feed Stuffs"?

A. Yes, sir.

Q. I hand you a sheet entitled, "Feed Stuffs" and ask you what that is, please, sir?

A. That is a copy, it is a news item on the meeting of the American Feed Control Association, and the quotation of the resolution they made at that meeting on soybean extracted, or soybean meal extracted by the trichloroethylene solvent.

Q. Is that the same resolution that Mr. Ford said he was familiar with, about labeling it, and saying it could not be used for cattle feed?

A. That was Mr. Reed, not Mr. Ford, and that is the same man that I talked to.

Q. And that's the same resolution that Mr. Reed admitted that he was familiar with?

A. Yes, sir, that was the resolution that was the subject of our discussion at that time, yes, sir.

Mr. Thomas:

I would like to introduce that in evidence as defendants' Exhibit D-9.

The Court:

Very well, sir.

(The document above referred to was marked as Defendants' Exhibit D-9 for identification, and is received in evidence as an exhibit to the testimony of Mr. R. Stuart Armstrong.

The Court:

Gentlemen, it is now 12:00 o'clock, and Court will be in recess until 1:30.

You gentlemen of the jury bear in mind the same instructions that I have previously given you, and be back in your places at 1:30 o'clock this afternoon.

(Whereupon, a recess was taken at 12:03 p.m. until 1:30 o'clock p.m.)

(Title Omitted.)

Afternoon Session.

The Court:
All right, gentlemen, proceed with the examination of the witness.

Mr. Thomas:
Mr. Armstrong, will you take the stand, please.

R. STUART ARMSTRONG resumed the stand for further examination.

Direct Examination (Continued).

By Mr. Thomas:
Q. Mr. Armstrong, right before His Honor called the noon recess, you were asked about, and you told us, about the November 23 telephone conversation and the sheet of "Feed Stuffs" that has been introduced in evidence you recall that?
A. Yes, sir.
Q. Now in this same conversation, what, if anything, did Mr. Reed have to ask about the progress being made on the University of Minnesota experiments?
A. He asked if there was anything new on the research work on the hemorrhagic diseases of cattle, if there had been any change.

Mr. Thomas:
That is all, Your Honor, on direct examination.

The Court:

Very well, gentlemen, you may cross examine.

Cross Examination.

By Mr. Brooks:

Q. Mr. Armstrong, on your first visit to the Magnolia plant in January, what did you see after you arrived there?

A. Well, of course, the first few moments were spent in the usual cordialities of meeting people, I am sure. We were accompanied by a Davidson-Kennedy representative also, and the group of us just discussed the prospective operations of the plant. I and the person who accompanied me from the Du Pont Company, F. G. Low, looked over the distillation solvent recovery end of the system, what equipment there was in place, it was not all connected up. The major components were there. It was more of an inspection visit than anything else, an acquaintance visit, you might say, getting acquainted.

Q. How many days did you remain on that visit at Magnolia?

A. We got down there, as I recall, about noon one day, we drove down from Memphis, and we left about the same time the next day.

Q. Did you go through the whole plant, through all of it, and view the equipment?

A. No, just the—We were primarily interested, you understand, in the solvent recovery part of it, that is, the distillation equipment, and the scrubbing equipment, that is, the solvent vapor scrubbing equipment.

Q. Did you make a number of suggestions, or any suggestions to Mr. Ford or Mr. Reed at that time, as to the efficiency of that plant and its operations?

A. It wasn't in operation.

Q. I said "and its operations".

A. It was not in operation, there wasn't anything in the way of efficiency in the operation we are talking about.

Q. Did you comment on the equipment?

A. Oh, I am sure we must have commented on the equipment. I don't recall any specific comments. It was so far from being completed.

Q. Did you recommend any additional equipment?

A. No, sir, I don't recall that we did.

Q. Now your next visit was in February, I believe?

A. Yes, sir, February 23.

Q. How long did you stay there at that time?

A. I stayed there from February 23, until about the 4th day of March, 1951.

Q. Tell us briefly what the purpose of that visit was what did you do while there?

A. Well, we had been asked to go down the help with the use and recovery of the solvent, and the safe handling of the solvent, trichloroethylene, during the initial starter. They had anticipated that that would be about the latter part of February. That would be their start-up date, and I made that visit to watch the performance of the trichloroethylene so far as its economical use was concerned and safe handling of it.

Q. Did you make any suggestions at that time as to additional equipment, or improvement in the equipment?

A. I believe I followed that visit up with a letter. I usually did. We did, as a matter of practice, on these service calls, you know, follow up any advice given on a visit as to the operation of the plant, and

so forth, or verbal suggestions, with written confirmation of the suggestions, so it is very likely I did follow that up and make some suggestions on the solvent recovery.

Q. You were acting in an advisory capacity, advising them, advising them with regard to the equipment and the operation of the plant, and so forth, were you not?

A. No, just on the handling and recovery of our solvent. This is a relatively expensive solvent, and to be competitive, we have to reclaim it, to re-use it, so the customer doesn't consume much of it, and that was my purpose in being there.

Q. You didn't discuss any of the other equipment, other than the recovery equipment?

A. What other equipment do you mean, Mr. Brooks? You mean the extractor?

Q. There is other equipment in addition to that just for the recovery of solvent, isn't there, Mr. Armstrong?

A. Oh, you mean the extractor, or the—

Q. Yes, the extractor.

A. And meal dryer.

Q. And for the toasting of the oil?

A. No, we had no special knowledge of that, and we didn't get into it except so far as the solvent recovery was concerned.

Q. And did you do the same when you were there in March?

A. In March? I visited there about March, 28, yes, sir. That visit was of the same nature.

Q. And then again you were there in May?

A. Yes, sir, I was requested to go down there in May to assist with solvent recovery. They were having trouble with it.

Q. During those five visits, you made no suggestions as to additional equipment, or improvement to the present equipment?

A. Well, as I said before, I may have made some suggestions along the lines of improving operation of our solvent recovery equipment in that plant, in those letters. I would have to see those letters to answer that question accurately.

Q. Before you went there in January, had you reviewed the files of the defendant concerning Magnolia?

A. Before I went to Magnolia in January?

Q. Yes, in January, had you reviewed the files in your office respecting the Magnolia Soy Products plant?

A. It would have been likely that I had, although I was accompanied by someone who was more intimately familiar with them than I was. I picked up more information after that call than before. I imagine it would be more likely that I reviewed them after the visit than before.

Q. Were you familiar with the sketches, charts, and drawings that had been sent by the defendant to, first, L. L. Ford and Lyman Reed, and the Davidson-Kennedy Company, and to Magnolia Soy Products plant?

A. I was not familiar with those sketches. I was aware that they had sketches of the plant.

Q. Had you ever gone over those files and reviewed those sketches prior to your May visit?

A. It is possible that I may, as far as this work I was doing, was concerned.

Q. You can't definitely recall?

A. I don't definitely recall that I did.

Q. You do know then what your predecessor recommended with regard to construction of that plant?

A. What?

Q. What your predecessor, T. J. Milligan, he was your predecessor, was he not?

A. Yes, sir.

Q. Do you recall his recommendations, what he sent to Magnolia?

A. I've seen them in the record, I have seen what he sent according to the records, yes.

Q. During the period of those five visits, when, Mr. Armstrong, did you learn about the sketches, you just said that you couldn't recall that you had been over them; now the question is—

A. Well, personally I don't recall that I ever had anything to do with the sketches, you see the plant was already erected there. I mean there wasn't a whole lot of it to be done, and there was no point in my going to the drawings and things of that sort.

Q. The plant was not completed when you made your first visit in January, was it, Mr. Armstrong?

A. That was an inspection visit. We spent very little time there.

Q. Now are we to understand you don't know what recommendations were made by Mr. Milligan, or do you know about the sketches and charts that he sent to L. L. Ford Associates, L. L. Ford, Lyman Reed, or the Davidson-Kennedy Company?

A. I think if you could show me what they were, I could tell you whether I had seen them before or not. I know Mr. Milligan, according to our records, sent them some advice on solvent recovery.

Q. But you can't say at this minute, from your knowledge, that you do know that you went over them?

A. No, I don't know which ones you are referring to, Mr. Brooks. I'm sorry, but if you can identify them, I can tell you, I am sure, whether I went over them or not.

Q. I am referring to the letter of T. J. Milligan, addressed to L. L. Ford, under date of August 11, 1950, with which he enclosed a number of charts, diagrams, and so forth, are you familiar with that letter?

A. Yes, I've seen a copy of that letter.

Q. And the enclosures?

A. I've seen the enclosures from time to time.

Q. Well, do you know what recommendations T. J. Milligan made with regard to fire hazards from trichloroethylene in a letter to L. L. Ford?

A. I don't recall anything specifically. If you can show me the letter, I'll tell you whether I recall it or not.

Q. Do you recall a letter signed by T. J. Milligan in which he stated that the fire hazard is principally confined to dust explosions, to explosions by dust?

A. I think that's quite true about a meal mill.

Q. Do you recall that he stated in a letter that a Tri plant could be built with much lower cost because of the low fire hazard?

A. I don't recall that specifically, but that is generally what is accepted as true.

Q. Well, is it not true that one of the big selling points of Tri as a solvent in the manufacture of soybean meal, is its non-inflamability?

A. It is relatively non-inflammable; it certainly is. yes, that was a selling point.

Q. And that was set out in many of your pamphlets, brochures and so forth; isn't that true?

A. Well, we gave the Underwriters Laboratory evaluation, I think, in each one of those pamphlets, in which the physical properties were discussed.

Q. And isn't it true, that in a schedule with either rated at one hundred, that Tri is rated at three?

A. That's correct.

Q. Now after the May visit, when were you next in Greenville at the Magnolia plant?

A. In August, August 3, when I delivered the letter.

Q. That was the time you delivered this letter to which you referred on your direct examination?

A. Yes, sir.

Q. Subsequent to August 3, have you been in Greenville for the purpose of visiting the Magnolia plant, subsequent to August 3, now?

A. After August 3?

Q. Yes, after August 3, 1951.

A. Not in 1951, no. I think that was my last visit in '51. I made my next visit in 1952.

Q. On what date; do you recall?

A. Well, that was in February.

Q. What was the purpose of that visit?

A. Mr. Ford called me and requested that I come down and discuss the situation that they had encountered with hemorrhagic diseases of cattle, that was his request. Now when we got down here, I was accompanied by a gentleman from our agents in this area; he was very little interested, Mr. Ford was, I mean, in the hemorrhagic disease of cattle, but made a request for money from the Du Pont Company.

Q. Subsequent to August 3, 1951, what correspondence took place between the defendant, the Magnolia Soy Products Company, or any of its officers?

A. Subsequent to August 3, 1951?

Q. Yes, August 3, 1951.

A. I can only answer for myself. I don't recall writing any letter to Magnolia for the remainder of that year.

Q. Did you write any letters with regard to a shipment of Tri on November 19, 1951, or prior thereto, in connection with that order, or was that all handled by telephone?

A. No, sir, I didn't write any letters, to the best of my recollection.

Q. So subsequent to August 3, 1951, you wrote no letters?

A. No.

Q. You wrote no letters to Magnolia or to any of its officers?

A. I don't recall any. Now our commercial people would handle the trichloroethylene end of it.

Q. Well, now, as to the defendant in this case, did the defendant write any letters subsequent to that date?

A. I believe the—Well, I have no specific knowledge, I have no exact knowledge what other letters were written after that date. I can't answer that question.

Q. You can't say whether the defendant wrote any letters subsequent to August 3, 1951?

A. I can only speak for myself, while I am quite sure there must have been commercial letters of some sort written.

Q. You don't recall writing a letter to Mr. Ford under date of January 17, 1952?

A. In 1952?

Q. Yes.

A. Yes, sir.

Q. Would you say you wrote that letter?

A. That's to Mr. Reed, not Mr. Ford.
Q. Excuse me, it is Mr. Reed, yes, sir.
A. Oh, yes, I wrote that letter.

Mr. Brooks:
If the Court please, the plaintiff offers for identification, I think it's Number 66, a letter of R. Stuart Armstrong, dated January 17, 1952, addressed to Mr Lyman Reed, Magnolia Soy Products Company, Greenville, Mississippi.

The Court:
Very well, sir, let it be marked.

Mr. Brooks:
I beg your pardon, Your Honor. I was just told that was already in evidence. That was my error, sir.

The Court:
Very well, go on.

(By Mr. Brooks):
Q. Do you recall the purport of that letter, you have just seen it?
A. It was to acknowledge receipt of a copy of a letter forwarded by him.
Q. Was that a copy of a report of Doctor Chadwick, the State Veterinarian of Mississippi?
A. Yes, it was a copy of a letter by Doctor Chadwick to someone.
Q. Now did you go to Minnesota, in 1951, to the University of Minnesota?
A. Yes, I attended a meeting there.
Q. About what time?
A. That was in late May or early June.

Q. Will you tell us when you or the defendant in this case, first discussed the research work being carried on at the University of Minnesota, with regard to the feeding of soybean meal to cattle?

A. Well, that was, to the best of my knowledge, the first discussion, certainly the first organized discussion of this hemorrhagic disease, about that time, that was the latter part of May or early June.

Q. Had you had any communications or phone conversations with the University of Minnesota with regard to this research, prior to your going there?

A. No, sir, I don't recall that I did at all.

Q. How did you know about the research work?

A. Well, we, in company with these other concerns who were vitally interested in the problem, approached the University to get their interest in the problem.

Q. When did you first learn of it?

A. Learn of what, sir?

Q. Of the research being carried on by the University of Minnesota on this subject?

A. At that time when we started to get or gather up the program, the members of that conference started formulating a program for the research.

Q. That was the third week in May?

A. Yes, sir.

Q. And when you went to the University of Minnesota, were told of any research at that time in progress?

A. I believe they had some rather informal experiments underway at that time, but nothing formal was started until we all agreed.

Q. Was there any mention made of work being done by Doctors Twehouse and Leasure?

A. No, sir, not at the University.

Q. At the time of your visit there?

A. No, sir, not to my recollection.

Q. Was there any discussion or mention whatever at that time concerning the deaths that had occurred, the outbreak that had occurred there in January of 1951?

A. The actual outbreak in Minnesota?

Q. Yes.

A. Oh, yes, that was the purpose of this meeting to determine what caused that, yes, sir.

Q. Did you learn at that time that 41 cows and calves had died by April 26, 1951, in Minnesota from the feeding of soybean meal, Tri processed soybean meal?

A. We didn't know at that time that it was Tri processed soybean meal. You see we had similar conflicting and confusing experiences before, and we just had to sort out these bits of evidence.

Q. Let me put it this way, Mr. Armstrong, did you learn that 41 calves and cows that had been fed Tri processed soybean meal had died in the Glencoe area during the year 1951, and that they had died by April 26, 1951?

A. I don't recall the specific area or the specific section, but I would say in general about that number in the Minnesota area.

Q. That was the Glencoe area?

A. I don't remember that.

Q. There is a Tri—or was there a Tri processing mill in Glencoe, Minnesota?

A. Yes, sir, the Farmers and Merchants Milling Company.

Q. And Du Pont did furnish or sell the Tri that was used by that plant, did it not?

A. We didn't sell to that plant directly.

Q. Well, did you sell to it through a broker?

A. We sold the trichloroethylene to a reseller in Minnesota, but I have no specific knowledge that he sold to that plant. At that time, I was not following sales of trichloroethylene, that is, personally.

Q. Did the defendant give the same technical advice to the Glencoe plant that it did to Magnolia, did you render the same service to that plant?

A. To the Glencoe plant?

Q. Yes.

A. Well, that processing plant was already pretty well established in that particular use of trichloroethylene in their Crown Iron Works equipment. I personally had never seen the Glencoe plant, and I have not seen it even to today.

Q. You testified on direct examination that the type of service that you gave to Magnolia and the type of service that Mr. Milligan gave before your going there in January, was quite usual.

A. Yes, sir.

Q. And that you say it was the same service that you gave other companies using your trichloroethylene, is that true?

A. Yes, sir.

Q. Well, from that, are we to conclude that Glencoe got the same type of service?

A. We—Let me explain this. The Glencoe plant was manufactured and sold to them by the Crown Iron Works Equipment Company in Minneapolis, Minnesota. We gave essentially the same service to Crown Iron Works that we gave to Magnolia, but they then took own from there from their experience, and there was no need for us going further with them.

Q. Well, the defendant was familiar with the operation of that plant, was it not?

A. No, sir, we were not familiar with the operation of that plant. I have never been in that plant.

Q. Well, had the defendant had any other representative to visit that plant?

A. Not to the best of my knowledge.

Q. Now after you were at the University of Minnesota in May, didn't Du Pont Company receive any report, progress report on the experiment that was being conducted there?

A. That's out of my specific knowledge, Mr. Brooks. Our toxicologists were in direct contact with them.

Q. Mr. Armstrong, of your own knowledge, did the defendant in this case receive any report, progress report, after your visit to the University of Minnesota in May, regarding the experiment and research at that university?

A. I'm sure they must have, but I couldn't give you, say, as of a certain date, that we did receive one, but I'm sure we must have. They must have because we were helping support the research.

Q. Did you ever see any reports?

A. Yes, I did.

Q. When?

A. That's hard to answer.

Q. Can you answer it?

A. What was the question?

Q. The question was, and we were talking about progress reports, or any type of reports from the University of Minnesota, after your visit, was it in May, I believe you said, is that right?

A. Yes.

Q. Well, now the last question was, when you had seen any of those reports?

A. I am sure I must have seen some in Wilmington, but I am not sure when.

Q. Did you see any in June?
A. In June of 1951?
Q. In June of 1951.
A. No, sir.
Q. That was the month following your visit.
A. No, sir.
Q. Did you see any in July?
A. I saw—And this wasn't a report, however, no, I didn't see any report in July.
Q. Did you say that you knew of the experiment being conducted by Doctor Twehouse and Doctor Leasure with two calves in 1951?
A. Yes, I heard they had conducted an experiment.
Q. Do you know when that experiment started?
A. No, I don't recall the date; no, I don't know.
Q. Don't you know when the first calf died? You don't know that, sir?
A. No, sir.
Q. Don't you know that that calf died on July 9, 1951?
A. I read that in their report. I've read their report.
Q. When did you read that in their report, Mr. Armstrong?
A. I think that report came out in—It was issued in possibly late November, and we probably received it rather shortly thereafter.
Q. Didn't you or the defendant in this case receive any reports concerning the deaths that they had prior to the published report; now I'm talking about a report from the University of Minnesota to the defendant?
A. Which university is that?
Q. The University of Minnesota.
A. No, sir.

Q. You received nothing?

A. No, sir.

Q. You now say that you received no report?

A. I'm answering from my own knowledge. I'm not answering for everybody at Du Pont.

Q. Until you read in the published report of Doctors Twehouse and Leasure, that was issued around, well, in October, you knew nothing about it until that time?

A. That's correct.

Q. That is correct?

A. Yes, sir.

Q. Now you had a conversation on August 31, 1951, with Mr. Ford and Mr. Reed at the time you delivered the letter of Mr. Shepherd of July 31, 1951, did you not?

A. Yes, sir.

Q. Please state what Mr. Ford said during that conference?

A. I believe I stated that in my testimony this morning. In general, I stated what was said.

Q. Mr. Armstrong, I am asking you what Mr. Ford said to you. I'm going to ask you what you said to Mr. Ford. Now that is my question. What did Mr. Ford say to you on August 3, 1951, in the conversation held at the time you delivered the letter of July 31, 1951, signed by C. B. Shepherd?

A. Well, Mr. Ford expressed concern over the letter. He pointed out the plant was shut down, and they had little hope of resuming operations, because of their bad credit, they couldn't buy any more beans.

He had heard of the Minnesota outbreaks, and that, combined with the letter and the recommendations with the letter of Mr. Shepherd, in his letter which I had just delivered, made him feel it would be more difficult for them to sell their plant, but they

did not expect to resume operations; they were going to look into the possibility, however, of channeling their meal produced to swine and poultry outlets. Those are the only things that I can tell you of that conversation that he said to me.

Q. What did you say to Mr. Ford and Mr. Reed? Give us, if possible, your exact words.

A. Well, that's impossible to repeat my exact words.

Q. Well, give them as closely as possible, please, sir.

A. I gave them the information we had at that time on the disease outbreak up in Minnesota. I gave them the information that research work was just starting at the University of Minnesota, and that we were helping support it; that there was other research work started at Iowa State College to determine the facts in this case. Mr. Shepherd's letter was complete in itself, and it spoke well on the entire matter and covered the subject.

Q. We are talking about your conversation, please, sir, Mr. Armstrong.

A. Well, I expressed the importance of that letter, needless to say we were concerned about this situation, too.

Q. What did you say about the Minnesota experiment?

A. I told them that the—

Q. Now I'm asking you what you said about it.

A. I told them that "Experiments are in progress".

Q. That's all you said?

A. And I said, "We hope they will shed some light on the situation".

Q. You just told them that experiments were in progress?

A. Yes, sir, and that nothing definite had yet been determined.

Q. Nothing secific had been determined.

A. No.

Q. Did you tell them about the 41 calves and cows that had died up to April 26, '51?

A. I am sure they must have heard about that. They had heard about those outbreaks, you see.

Q. How do you know they had heard about them?

A. They told me so.

Q. They told you so?

A. Yes, sir.

Q. In that conversation?

A. Yes, sir.

Q. Mr. Ford told you that he knew about the 41 cows and calves dying in Minnesota in 1951?

A. They knew that cattle and calves had died in Minnesota in 1951, yes.

Q. But they didn't know about that specific incident, did they?

A. What specific incident?

Q. The incident where those 41 cows and calves died in one area now, they just knew there had been some deaths of cattle in Minnesota, or that there had been an outbreak up there, isn't that right?

A. They knew there had been an outbreak up there, associated with the feeding of Tri extracted meal. I don't think that any number of cattle was mentioned.

Q. You, this morning, emphatically denied every statement made by Mr. Ford at the time he testified?

A. Yes, sir.

Q. In the Ladner case.

A. Yes, sir.

Q. Very well. Was this question asked at the time you were testifying as a witness under oath in that case:

"At the time of the delivery of the letter, what knowledge did you have as to there being any definite factor isolated which was causing the deaths of cattle in association with Tri extracted soybean meal?"

A. Yes, it was asked me.

Q. When you delivered the letter to Mr. Reed and Mr. Ford of Magnolia Soy Products Company, Greenville, Mississippi, do you remember what was said by them at that time, was that question asked you, and did you answer it, "They were very much concerned over the letter, which seemed, due to the circumstances, they were in bad financially, or in a bad condition financially, and it was told to me that they wanted to sell the plant for $500,000.00. They had information on the cattle deaths in Minnesota in 1951, and that information, and the delivery of that letter made it impossible for them to get the price they wanted for that plant". Was that your answer, Mr. Armstrong?

A. I would say in general, it is.

Q. Were you asked this question:

"Can you tell us whether there was any other instructions given you by Mr. C. B. Shepherd with reference to the delivery of the letter, or anything pertaining to it?"

And was this your answer:

"I think that covers all of it to the best of my knowledge."

Was that your answer, Mr. Armstrong, as you recall it now?

A. Yes.

Q. Now the next question:

"To the best of your recollection, there was not any other instruction given you by Mr. Shepherd"?

And did you answer in this manner:

"Yes, to the best of my memory, I was told to deliver and stress the importance of the letter and be certain that it got into the hands of the proper person".

Now the next pertains to an entirely different subject. I want to ask you this, was that your answer?

A. May I ask you a question?

Q. Yes, sir.

A. Was this from my testimony of this morning?

Q. No, no. This was the testimony you gave, as I just stated it, as a witness under oath in the trial of Ladner Vs. Du Pont. Was that your answer? I'll repeat it:

"Yes, to the best of my memory, I was told to deliver the letter and stress the importance of it, and be certain it got into the hands of the proper person".

A. Yes.

Q. Now that was your entire testimony on the subject of the conversation you had with Mr. Ford and Mr. Reed at the time you testified in the Ladner case, wasn't it?

A. The entire testimony?

Q. The entire testimony, yes.

A. I can't remember that transcript.

Q Well, here is the transcript. Look at it and see, sir.

A. Well, if there is anything further I said, I would remember it.

Q Well, just go ahead and look at it and see if you can find anything further that you said.

A. It might take a while to read it.

Q. Well, just go ahead and read it. Now I don't mean everything that is in that transcript. Go ahead and see if you said anything else about this conversation that you had with Mr. Ford at the time of the delivery of that letter.

A. That seems to be all.

Q. Then were the questions and answers correct, Mr. Armstrong, as I read them to you?

A. Yes, as you read them.

Q. Mr. Armstrong, at that time, Mr. Ford was in Greenville?

A. At which time?

Q. At the time of the trial of the Ladner case.

A. No, he was in Poplarville—

Q. Correction, my error.

A. Yes, sir.

Q. He was present at the trial of the case of Ladner Vs Du Pont at Poplarville, Mississippi, was he not?

A. He was a witness there, yes, sir.

Q. And he testified as a witness in that case, didn't he?

A. Yes, sir.

Q. Mr. Ford is not in Greenville today, is he, Mr. Armstrong?

A. I don't know about that. I haven't seen him.

Q. Don't you know that Mr. Ford left several weeks ago for Iran?

A. By hearsay. I heard that. I couldn't know it.

Q. Now you also know that the testimony of Mr. Ford by deposition was admitted in evidence in this case, that is, the testimony of Mr. Ford in the Ladner Vs Du Pont case was admitted in evidence under stipulation of counsel in this case, do you know that, Mr. Armstrong?

A. Yes, sir.

Q. Why did you not in the Ladner Vs. Du Pont case, deny the statements made by Mr. Ford when he testified as a witness in that case?

A. I didn't know what Mr. Ford testified to in that case until I read the transcript of the trial.

Q. Well, you didn't deny any statement he made, did you?

A. I didn't know what he stated in that case.

Q. Did you deny any statement that he made?

A. I didn't know what statements he made, as I couldn't deny them.

Q. Do you know whether you denied them or not, you know that, don't you?

A. I denied them here today.

Q. Did you deny them there at that time?

A. At that time, I didn't know what he said. I was out waiting in an outside room, like I have been here today. I don't know what Mr. Ford stated.

Q. You just read your testimony, have you not?

A. Yeah. I've read my testimony here about this conversation.

Q. Well, you just read it when I gave it to you a few moments ago, isn't that right?

A. Yes.

Q. And that testimony doesn't contain any denial on your part of any statement made by Mr. Ford, relative to that conversation at the time of the delivery of the letter of July 31, on August 3, 1951, does it?

A. You are asking me that one

Q. I'm asking you that now.

A. As of my knowledge today, I am sure I denied them.

Q. Well, according to that transcript, you didn't deny a statement made by Mr. Ford in the Ladner Vs. Du Pont case, of the conversations that were held with you on August 3, 1951?

A. If you will give me that transcript again, I'll look at it. I can't read it all at once.

Q. Very well, here it is.

A. Can you show me what Mr. Ford's testimony was to compare against this that you are asking me if I denied anything that he said; is that what you are asking?

Q. The question is very simple, Mr. Armstrong.

A. Not to me.

Q. I asked you if that testimony contained any denial by you of any statement made by Mr. Ford concerning that conversation at the time of the delivery of this letter on August 3?

A. This testimony that I have here?

Q. Yes, that testimony you have there. Do you see anywhere in it where you denied anything Mr. Ford has said?

A. No, I don't.

Q. Then there is no denial there?

A. No, not at that time.

Q. You did know that Magnolia Soy Products Company ordered additional Tri from Du Pont in October of '51, did you not, Mr. Armstrong?

A. Yes, I heard that, by my order clerk.

Q. Well, didn't you have a telephone conversation with Mr. Reed with regard to a shipment of Tri at that time?

A. Yes, he called me, well, he called me November 1, at the time of that explosion, to ask me to have the shipment delayed.

Q. So through that conversation, you did know that they had ordered additional Tri, didn't you?

A. I actually knew it shortly before that time, but I knew it at that time, yes.

Q. And as a result of that, you did postpone shipment until about the third week in November?

A. I put the machinery in motion to postpone it, yes, sir.

Q. After August 3, 1951, did you know or have any knowledge whatever from any source whatever that Magnolia was processing soybean meal for sale as cattle feed?

A. No, sir.

Q. For what period, how long, Mr. Armstrong, was it, when you first learned of it, after this time?

A. I first learned that they—Well, first—Now let's put it this way. The first occasion that I had to know that they had sold it for cattle feed was when Mr. Ford called us on January 8, 1952, and stated there was an outbreak in Poplarville, Mississippi.

Q. At that time, he told you of an outbreak in Poplarville, Mississippi?

A. Yes, sir.

Q. He told you that in that conversation?

A. Yes, sir, he said there were some deaths that he had just heard of, and he only had a little information on it.

Q. And from that conversation, you knew they had, after August 3, 1951, actually processed and sold the meal for cattle feed, and that cattle had consumed the meal, and that cattle had died at Poplarville, Mississippi, is that right?

A. I knew cattle had died at Poplarville, Mississippi, by his report

Q. The letter which you just identified contained a report of Doctor Chadwick, the State Veterinarian of Mississippi, or a copy of it to James Sinclair, County Agent of Pearl River County, Poplarville, Mississippi, and you acknowledged receipt of that report in the letter of January 17, did you not, Mr. Armstrong?

A. Yes, sir.

Q. Now doesn't that report contain these statements that 65 cows died—

Mr. Thomas:

If the Court please, we object to any reference by indirection purporting to come from someone else not present for cross examination or involved in this lawsuit. He is purporting to state from a letter written by Doctor Chadwick to James Sinclair, County Agent of Pearl River County, and that gentleman is not here for cross examination.

The Court:

Well, as I understand the gentleman, he merely asked the witness if he had that information.

Mr. Brooks:

That is correct, Your Honor. I asked him if he had knowledge by letter, and that letter is in evidence in this case. I asked him about receipt of that report, and his return of that report to Mr. Lyman Reed. I am asking if that report concerned certain things. Now I'm not asking whether they are true or not. I am merely asking if it contained certain facts.

The Court:

Well, I think that is competent under the circumstances. Go ahead.

(By Mr. Brooks):

Q. Does the report further state that Doctor Chadwick had directed that merchants having Magnolia Soybean meal, stop selling that meal?

A. Could I see that report? I can't remember.

Q. Yes, sir. Here is the report.

A. Would you repeat your last question, please?

Q. The last question?

A. Yes, sir, will you repeat it, please?

Q. Didn't Doctor Chadwick, in that letter, state that he had directed that Magnolia soybean meal not be sold subsequent to the date of that letter?

A. I don't see that in here. I want to point out right now, that I'm not a toxicologist. I'm a chemical engineer. When we get something like that, we just turn it over to our specialists, although I would have knowledge of its coming from one of my acquaintances in the field, I'm sure.

Looking over this, I would say, yes, sir, in that report, he has advised Mr. Thigpen that it was poison bean meal he was selling that was primarily the cause of the loss of cattle, and he was advised not to sell any more of that meal until further advice.

Q. Now from that report, you did know that subsequent to August 3, 1951, Magnolia had been processing meal by Tri extraction methods, and had sold that meal?

A. At that time?

Q. Yes, you certainly knew it when you read that report.

A. We could infer that was the case.

Q. Did you or the defendant send copies of any reports received at any time from Minnesota, from the University of Minnesota, on the work done there.

to Magnolia Soy Products Company, or any of its officers, copies of reports themselves, I'm talking about?

A. To Magnolia?

Q. Yes.

A. No.

Q. Now going back to the Colorado incident; did you ever discuss that incident with Mr. L. L. Ford or Mr. Lyman Reed or with anyone connected with the Magnolia Soy Products Company?

A. I didn't myself, but it had been pointed out to them.

Q. Was any report on that incident, any written report, or copy of any written report, ever sent to Mr. L. L. Ford or Mr. Lyman Reed, or Mr. J. M. Warren, President of Magnolia, other than the statement contained in the letter of T. J. Milligan?

A. Any kind of a written report on the Colorado cases?

Q. Yes.

A. On the Colorado outbreaks, you mean?

Q. Yes, the outbreak that occurred in 1949 and 1950.

A. Not to the best of my knowledge, I know of no report of that outbreak.

Q. Then you didn't discuss that, after you succeeded Mr. Milligan, I think you testified, were any officers of Magnolia ever told of that incident, and was it discussed?

A. I told you a few minutes ago, that in our discussions, the night of August 3, mention of that came up.

Q. Of the Colorado incident? You didn't say that before, to my recollection, Mr. Armstrong.

A. Well, maybe I mis-spoke myself.

Q. Now when the Tri was sent as a result of that November 1 phone call, what labels were on the drums?

A. I don't know.

Q. Did you ever see the drums shipped by your company?

A. Not after that date, no, sir.

Q. That is, to Magnolia, I'm speaking of.

A. No, sir.

Q. So you can't say whether they had labels or didn't have labels?

A. No, sir.

Q. Do you know whether Tri is listed as a drug in the United States Pharmacopoeia?

A. No, sir, I don't know; I just don't know.

Q. You never made inquiry to ascertain that?

A. I don't recall making any inquiry. I wouldn't say I never did.

Q. After August 3, did you or anyone connected with the defendant in this case, make inquiry as to whether or not Magnolia was processing meal for sale for cattle feed?

A. No, sir, we never made any such inquiry.

Q. You never did make any inquiry into that?

A. No, sir, we had no reason to think that they were. We had given them our recommendations.

Q. I understand that; now did you ever suggest to them that the meal be labeled in any way?

A. I asked Mr. Reed if they were aware of the American Feed Control resolution.

Q. The question was—

A. And he was aware of it.

Q. Did you suggest that they put labels on the meal?

A. That resolution was a suggestion, and Mr. Reed was aware of it.

Q. Did the defendant make the suggestion that they put labels on it?

A. I guess that would be called an indirect suggestion.

Q. Did the defendant make any suggestion in writing or by telephone after August 3, or at any time, that Magnolia put a label that the meal should not be fed to cattle, on the bags of soybean meal they sold?

A. We made no suggestions like that, no, sir, other than my phone conversation, which I have already related.

Q. You never did that at any time?

A. You mean in the phone conversation?

Q. You don't recall making any such suggestion, do you, Mr. Armstrong, telephone calls on that point, you don't remember ever making that statement, do you?

A. Yes, we discussed, or we mentioned that American Feed Control resolution, and the "Feed Stuffs" article, and Mr. Reed had seen it.

Q. Yet you did, in a telephone conversation you mentioned on November 23, you asked if he had seen that resolution?

A. Yes, sir.

Q. Mr. Armstrong, I think you testified that you asked if he had seen the resolution prohibiting the sale of soybean meal, tri processed soybean meal, for cow feed?

A. I used the word prohibited in connection with the laboratory report.

Q. Now I hand you Defendant's Exhibit marked D-9, and in that second paragraph is the resolution. Would you please read that to the Court and Jury.

A. You want me to read this thing?

Q. Just read the resolution, please.

A. (Reads.) The resolution is as follows: "Be it resolved that this association goes on record as discouraging the use of Tri solvent extracted soybean oil, oil meal, flakes or pellets, in rations for calves, dairy and beef cattle, until it had been proven that these products are non-toxic to such animals, that when these products are sold or offered for sale, the processor or manufacturer shall place a warning stamp prohibiting their use, and it shall be stated on the label."

Q. The word "prohibit" is not in there, Mr. Armstrong.

A. The word "prohibit"? Well, I just read it that way.

Q. It is a mere recommendation, the way you used the word in there, isn't it?

A. No, sir, I stated the word "prohibiting" on the label. I did that probably because I am so familiar with it.

Q. What does the label say?

A. It just makes a recommendation.

Q. So that is just a recommendation?

A. It is a recommendation resolution.

Q. The resolution contains a recommendation as to the type of label that the manufacturer is to use, is that correct?

A. I don't see the word "recommendation" used in there.

Q. Well, let me see what it does say.

The word is "discourage", is it not?

A. Yes, sir, "discourage" is the word used, but the label prohibits the use, and it's in there very strongly, the whole feed trade was acquainted with that article in there.

Q. Now they didn't say that it would be prohibited, did they?

A. Well, on the label it says it is prohibited.

Q. Well, they recommended that the meal not be sold, discouraging the sale of meal until such a label was put on the meal, did they not?

A. Which prohibited its use.

Mr. Brooks:

That is all, Mr. Armstrong, that we have to ask you.

The Court:

Is there anything further from this witness?

Mr. Thomas:

No, sir.

Come down, Mr. Armstrong.

(Witness excused.)

* * * * * * * *

C. B. SHEPHERD, a witness called by and on behalf of the defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Thomas:

Q. You are Mr. C. B. Shepherd?

A. That's right.

Q. And you sign your letters C. B. Shepherd, too, do you not?

A. Yes, sir.

Q. Mr. Shepherd, where do you live?

A. Wilmington, Delaware.

Q. For how long a period of time have you been connected with E. I. Du Pont De Nemours Company?

A. 27 years.

Q. Has that been continuous service, Mr. Shepherd?

A. Yes, sir.

Q. How old are you, sir?

A. 48.

Q. What college or colleges are you a graduate of, Mr. Shepherd?

A. Drexel Institute of Technology.

Q. Where is that located, sir?

A. Philadelphia, Pennsylvania.

Q. What degree did you receive there?

A. I received a B. S. degree in Chemical Engineering.

Q. In what year?

A. 1928.

Q. On graduation, what was your first employment?

A. I was employed immediately by Du Pont as a chemical engineer in Wilmington, Delaware.

Q. You went from college to work for du Pont as a chemical engineer?

A. That's right.

Q. And you have remained with them continuously since that date?

A. No, I was transferred to the Engineering Department, still in Wilmington, however, after about four years, and in 1939, I was transferred to Niagara Falls to the Electrochemical Department.

Q. In what capacity?

A. As Solvents Sales Department Engineer.

Q. But you have continually been in the Solvents Department at Niagara, was that right?

A. No, just about two years before the war broke out, I was transferred to the Chemical War Department plant.

Q. How long were you there?

A. About a year.

Q. In that plant, or at Niagara Falls?

A. In that plant.

Q. Were you in the same plant at Niagara Falls?

A. No, sir, then I was transferred back to the Niagara plant of the Electrochemicals Department as Assistant to the Plant Manager, and shortly after that as Assistant Manager of the Assembly Works Group.

Q. Well, now what is that group?

A. That was a group that was engaged in the development work on war problems.

Q. From Niagara plant, where did you go?

A. In 1945, I was transferred to the Sales Department.

Q. Have you been in that department until now with Du Pont?

A. Yes, sir.

Q. In what capacity are you at Wilmington?

A. I'm in the Sales Department, Manager of the Solvents Division.

Q. That's the same division—in other words, how does your capacity now correspond with what it was then?

A. I was promoted to Manager a couple of years later, of the Solvents Division. It means a little more than the position I had in the job preceding that, and I am now Manager of the Chlorine Products Division, which is, I think, an improved status.

Q. How long have you been Manager of the Chlorine Products Division, Mr. Shepherd?

A. Eight years.

Q. Eight years?

A. Yes, sir.

Q. Mr Shepherd, do you know R. Stuart Armstrong, who just left the witness stand a short while ago today?

A. Yes, sir.

Q. In the year of 1951, under whose supervision was he?

A. Mine.

Q. What was his capacity, or what did he do, please, sir, under your supervision?

A. He was Solvents Technical Representative.

Q. Do you recall what time he made his first connection in your department and under your supervision?

A. It was in 1951, in January.

Q. When he first came to your division in January of 1951, and through the remainder of 1951, and on into 1952, he was Technical Solvents Representative in your division, is that right?

A. Yes, sir.

Q. And what were the duties of Mr. R. Stuart Armstrong as Technical Representative, Solvents Technical Representative in your division, is that right?

A. Yes, sir.

Q. And what were the duties of Mr. R. Stuart Armstrong as Technical Representative, Solvents Technical Representative?

A. His duties were to assist customers or prospective customers in the economical use of our products.

Q. How did these services that were rendered by him compare or relate to Du Pont generally, that is, to Du Pont's services generally?

A. Du Pont does that in most every department. In fact they do it in all departments.

Q. How does that type of service rendered by Du Pont, rendered by it compare to that service rendered rendered in general by the chemical industry?

A. That is comparable to any rendered by the chemical industry in general.

Q. Do you so know some of the large national concerns that follow identical practice?

A. They all do, as far as I know, but to my knowledge, I know that Niagara Alkali, Looker, Detrex Corporation, all good competitors of ours, do the same thing, and the Shell Chemical Company, and the Doe Chemical Company, and American Cyanamide.

Q. Now what is meant, Mr. Shepherd, by the term "Technical Sales Service"; what is meant by those words?

A. We define that as covering two categories of technical service to customers.

In one category, we offer and give technical assistance to equipment manufacturers or companies who are starting a new process, either extending their equipment, or on their initial start-up of equipment, which uses our solvent. We give them as much assistance as we can in solvent recovery, and in that portion of that process.

Q. All right, sir, now in the other category, what do you do?

A. In the other category, we give service to what you might call our regular customers who are using established processes, but that type does not require

much time on the part of our men, we've had some several thousand customers using our solvent, and that means that we have to have adequate manpower to give that service satisfactorily, which we try to do.

Q. Does Du Pont render the same service in other fields, with respect to those who use Tri?

A. Yes, we render different degrees of service to those using our solvent.

Q. How long do you stay with a customer, Mr. Shepherd?

A. Well, in the early development, we work two or three weeks with them on the equipment. We spend full time work with them on design of equipment and teaching them as to the use of the solvent, and stay until we feel that they would be sufficiently informed to where they could carry on the operation, and until they would be competitive. Now also on the equipment companies, that manufacture equipment which will be put to use handling our solvent, using it for extracting various products, we stay with those people and give them every direct help that we can toward the using of the technical company's equipment, and we give those technical companies who manufacture the equipment, everything that we know about it, and when we leave, why, the companies require no further service.

Q. Has Du Pont rendered service to others in the use of Tri?

A. Yes, sir, to several companies. Crown Iron Works is one.

Q. Where is that company located?

A. Minneapolis, Minnesota. We detailed, or I detailed a man to spend his full time with them in their solvent recovery system, and that same person spent quite a bit of time assisting them to start up their first unit.

Q. What occasion, if any, do customers have to request such services from Du Pont, as you have just described in the use of Tri as a solvent, Mr. Shepherd?

A. Why, we get requests of that kind all the time, many times, and we have probably spent thousands of dollars of information, engineering, chemical information, and information on physical properties of our solvent that no individual company interested in the use could possibly obtain for themselves, so naturally they call on us for that information.

Q. Mr. Shepherd, with particular reference to Magnolia Soy Products Company, how would you classify that service?

A. With Magnolia Soy Products Company, I would say that I would classify that under both categories, and they received the technical assistance from us in the design of their solvent recovery equipment, later in the initial operation of that equipment.

Q. What is meant by a solvent?

A. I'd say in simple terms that a solvent is a liquid capable of or used for dissolving other liquids or solids.

Q. What is meant by solvent recovery? What do you mean by that term?

A. We use that term to mean the recovery of our product, our solvent, in a process so that it can be reused, over and over again, in the processes with minimum loss.

Q. Mr. Shepherd, what are the advantages of Tri, if any, over other solvents?

A. The major advantage is the relative non-inflammability, thereby reducing the fire hazards which lowers insurance rates, and it requires less expensive plant equipment.

Q. Now of your own knowledge, do you know whether or not Mr. R. Stuart Armstrong had contact with Magnolia at Greenville, Mississippi?

A. Yes, sir.

Q. To whom, if anyone, were his reports made concerning visits to Magnolia?

A. Me.

Q. And you are Manager of the Chlorine Products Division, and were at that time?

A. Yes, sir.

Q. When were you first aware of the relationship between hemorrhagic diseases in cattle the and feeding of Tri processed soybean meal?

A. I first became aware of that in 1939, shortly after I moved to Niagara Falls. The chemical group there had studied reports from Stockman and some German authorities on hemorrhagic diseases in Scotland, in Germany and in the Low countries, and they concluded that those reports were contradictory and inconclusive.

Q. Did the Du Pont Company conduct or finance any experiments to determi the relationship of this feed by Tri extracted soy bean meal to hemorrhagic disease of cattle in this country?

A. Yes, sir. Attempting to determine whether Tri extracted soy bean meal had any connection to hemorrhagic disease in cattle or had any effect on cattle, we initiated tests at Cornell University under the direction of Professor Maynard.

Q. Is that spelled M-a-y-n-a-r-d?

A. That is right. He was a well known nutritionist and he worked in close collaboration with our Doctor Vollotson of the Electro-chemical Department.

Q. All right, sir. Doctor B. H. Vollotson of the Electro-Chemical Department?

A. Yes, sir.

Q. Do you know now long these experiments extended?

A. From 1937 to 1939.

Q. I believe that that report has been here in this case, has it not? You don't know whether it is in evidence, but there is such a report?

A. That report was issued sometime in 1941 by Vollotson. It was prepared in collaboration with Maynard.

Q. With Professor Maynard?

A. Yes, sir.

Q. What did Du Pont do after the Cornell University experiments were completed?

A. Nothing; we were just entering World War II about that time and all of our technical personnel and efforts were completely assigned to the war effort, and we did nothing at all on this soy bean extraction. Several other companies moved up on it though and installed plants during the war, and at the end of the war four more plants were operating and producing meal.

Q. Do you know some of those concerns that had got in there?

A. Yes; the Farm Cooperative Bureau at Springfield, Thompson at Hiawatha, Roach at Plainfield and there was one in Indiana, Indiana Farm Bureau Cooperative, I believe.

Q. Now when did Du Pont become interested again in the use of Tri as an extraction agent for soy beans?

A. In 1947 after several equipment companies approached us and said they were very much interested in designing equipment for the extraction with Trichloroethylene for soy beans, cotton seed, and asked us for technical assistance and engineering data on our products.

Q. What awareness, if any, did you have there in the year 1950 as to hemorrhagic disease of cattle being associated with tri extracted soy bean meal, in the year 1950?

A. Sometime in the early Spring of 1950 we had reports from Iowa and Colorado that there had been some deaths of cattle that might possibly be associated or connected with Tri-chloroethylene extracted meal. These were the first reports we ever received in this connection. Actually by that time some sixty million pounds of mean had been sold with no bad results, no complaints.

Q. Tri extracted soy bean meal?

A. Yes, sir; processed and sold with no complaints at all.

Q. And that was the first report in this country of there being any association with the hemorrhagic disease and tri extracted soy bean meal?

A. That's right, in the Spring of 1951 to our knowledge.

Q. What decision or what efforts, if any, did Du Pont make concerning these reported outbreaks in Colorado and Iowa or either?

A. I sent two men immediately to investigate these reports, and the first went to Iowa, and from there to Colorado where most of the cows were killed. Some died, some 150 cows and they found that only 20 of the 150 had ever used the Trichloroethylene extracted soy bean meal, but the others, based on every bit of information we could obtain through the processors, through the farmers, or the state veterinarian, had never used Trichloroethylene extracted soy bean meal, but had been on either hexane extracted or expeller meal. Now that looked like a solution of the Trichloroethylene in that case and the possibility of

trichloroethylene being a factor at all was completely rejected by the State Veterinarian there.

Q. Of Colorado?

A. Yes, sir.

Q. Was the firm or partnership of L. L. Ford Associates notified or advised of this outbreak in Colorado and Iowa and the investigation made?

A. Yes, sir.

Q. They were notified of those outbreaks and the investigation of those things you have just testified about?

A. Yes, sir.

Q. What occurred in the year 1951 or the next year, concerning hemorrhagic disease in connection with or association with Tri extracted soy bean meal, to your knowledge?

A. We had no further complaints of any type until the Spring of 1951, when we had a report of deaths in Minnesota, which against might possibly be attributed to the feeding of Trichloroethylene extracted soy bean meal, and again we investigated those deaths. This time I sent a man out who contacted the University of Minnesota and the National Soy Bean Association—Soybean Processing Association, and they got together a team which investigated the deaths in the field, and they did establish, after considerable time, following through with the individual farmers, that Trichloroethylene extracted meal had apparently been fed in every case to those cattle. That was the first time that had been apparent.

Q. Now that was when a program was agreed upon with the University of Minnesota in connection with working on the program or experiment to determine the death factor, if they could?

Q. After that information had been developed, we, in cooperation with the University of Minnesota and others interested, worked out a program for research to determine if tri extracted meal was in fact associated with these deaths in Minnesota.

Q. Did Du Pont make any monetary contribution to this program at the University of Minnesota?

A. Yes, sir; we made the major contributions.

Q. And were other concerns, feed concerns, or equipment manufacturers likewise interested and made contributions?

A. Yes, sir.

Q. Could you name some of those, just one or two?

A. Yes; A. Staley Company, Funk Brothers, and several of the mills in Minnesota using the trichloroethylene process, and the Crown Iron Works who made and sold the trichloroethylene processing equipment to those mills.

Q. Do you recall about when it was that the contract for the program, the research program, was made, when it was finalized, or became final, or agreed upon by the parties, do you remember what month or what time it was?

A. It was in the latter part of July.

Q. Of what year?

A. 1951.

Q. What awareness did the United States Food and Drug Administration in Washington, D. C., have in connection with the program agreed upon with the University of Minnesota?

A. I sent Mr. Armstrong down to Washington to [illegible] Food and Drug Administration in June to acquaint them with the developments in Minnesota, and our conversations with the University of Minne-

sota and the National Soybean Processing Association, and we discussed in some detail the proposed research program to be carried out by the University of Minnesota, and we went ahead on that program shortly thereafter, after they had given their full approval.

Q. Mr. Shepherd, are you familiar with what is known as the American Feed Control Officials Association?

A. Not directly. I know of them.

Q. You have heard of them?

A. Yes, sir.

Q. Do you know of your own knowledge of any steps taken by that association regarding Tri extracted soybean meal, or the hemorrhagic disease of cattle in 1951?

A. Yes, sir, they issued a resolution sometime in the fall, stating that meal should be labeled with a label, indicating it was Tri extracted meal, and the label should indicate its use for cattle feeding should be prohibited.

Q. Do you recall whether that was done before or after July 31, of 1951?

A. That was after that date. It was in the fall.

Q. In the fall of 1951?

A. Yes, in October of 1951, I think.

Mr. Brooks:

When did you say; what was that date, Mr. Shepherd?

A. In October of '51, I believe, Mr. Brooks.

(By Mr. Thomas):

Q. After the program of the University of Minnesota was agreed upon, what occasion, if any, did you

have to write a letter to Magnolia Soy Products Company?

A. I wrote a letter to Magnolia Soy Products Company on July 31, 1951, pointing out that there had been some deaths in scattered areas which were associated with the feeding of Tri extracted soybean meal, that while all evidence was entirely circumstantial, it had been shown that Tri meal had been used, and we strongly recommended that the sale of this Tri soybean meal should be channeled into other fields such as swine and poultry fields.

Mr. Brooks:

If the Court please, when he said that they strongly recommended, are you referring to the wording in that letter now, your letter of July 31? If you are not, I'm going to object. The letter stands for itself.

The Court:

All right, gentlemen; that's true. Let's let him read the letter. What he said is in it. Let him read it.

Mr. Thomas:

What he said—

The Court:

No matter what he said, let him read the letter.

(By Mr. Thomas):

Q. Mr. Shepherd, I hand you what purports to be a letter on the letter head of Du Pont and ask whether or not you have ever seen that before?

A. Yes, sir; I have.

Q. Who wrote and signed that letter, Mr. Shepherd?

A. I did. I believe it is directed to Mr. Lyman Reed, Sales Manager.

Q. When is it dated?

A. July 31, 1951.

Mr. Thomas:

If the Court please, we would like also to have this made an exhibit to our testimony, Judge, I know it is in the record.

The Court:

All right, sir; let it go in. It is already in. Mr. Thomas I think it would be more satisfactory to let him go ahead and read the letter.

Mr. Thomas:

Very well, sir; we will do that, Your Honor.

The Court:

Yes, sir, the letter should be read.

(By Mr. Thomas):

Q. O. K., Mr. Shepherd, would you read the letter which has been marked as Exhibit 10 to this cause?

A. Yes, sir.

(Reads the following letter.)

This is on the letterhead of E. I. Du Pont De Nemours and Company. It is dated July 31, 1951.

"Mr. Lyman Reed, Sales Manager
Magnolia Soy Products Company
Greenville, Mississippi

Dear Mr. Reed:

In recent months, there have been increasing indications that trichloroethylene-extracted soybean meal

may be associated with a hemorrhagic disease in cattle which has been observed in widely-scattered areas. Research programs are now being undertaken by the University of Minnesota and Iowa State College to investigate the nature and cause of the disease and to determine if trichloroethylene-extracted meal is, in fact, a contributory factor.

The cause of the disease is unknown. The evidence that trichloroethylene-extracted meal is associated in any way with the disease is entirely circumstantial, but the most recent reports have all come from farms using this type of meal in their cattle feed. Thus, despite the satisfactory experience with trichloroethylene-extracted meal in the past, we cannot ignore the possibility that this meal under certain conditions, perhaps in combination with one or more other factors, may be associated with the particular hemorrhagic disease observed in Minnesota and other scattered points.

In view of the present uncertainty, we strongly recommend that sales of trichloroethylene-extracted meal be confined to outlets other than cattle feed until more definite information is available from the investigations now underway in Minnesota and Iowa. To the best of our knowledge, the hemorrhagic disease in question is peculiar to cattle only, and all the available evidence and experience indicates that trichloroethylene-extracted meal is entirely satisfactory as a component for feeding hogs and poultry.

Yours very truly,

C. B. SHEPHERD,

Manager Chlorine Products Division."

Q. That letter is signed by you?

A. Yes.

Q. By whom was that letter to be delivered to Magnolia?

A. By Mr. Stuart Armstrong.

Q. And to whom was that open letter to be delivered under your supervision in this country of like tenor, what other letters?

A. Well, we sent similar letters to all known processors of soybean meal, using Tri as a solvent.

Q. Who gave instructions to Mr. Armstrong to deliver the letter to Magnolia?

A. I did.

Q. And what was that instruction?

A. I told Mr. Armstrong to deliver the letter personally, to see that it was delivered to the person to whom addressed, or a responsible officer of the corporation, or in his absence, to make sure the information of that letter was stressed, and understood, and to arrange and answer any questions that might have been asked regarding the research work that was underway in Minnesota.

Q. Mr. Shepherd, how long have you been familiar with the chemical compound called Tri?

A. Since 1939.

Q. State what uses this compound has and did have in 1951?

A. Well, it has a large number of uses, the most important one is used in the metal—

Mr. Brooks:

Just a minute. If the Court please, I think that in going into the many uses of Tri, he is getting completely outside the field at issue in this case, and we object to it.

Mr. Thomas:

We take the position, if Your Honor please, that we should be allowed to show that Du Pont was active in promoting the sales of Tri all over the country, and that it was being used as a solvent, and we think it would be entirely competent.

The Court:

Well, I think it is all right to go into the general situation, but now don't get into a lot of details as to how many uses, why one of the other witnesses has already testified and I am sure correctly, that it had many uses. Now if you want to mention some of the uses, one or two, as have already been put in the record, why you may do that, but we don't have time to have every witness come up here and tell us what it is used for, tell us the same thing. I remember what he said.

Mr. Thomas:

I mean to be very short on this, Your Honor.

(By Mr. Thomas):

Q. Go ahead, sir.

A. Well, it is used in metal cleaning, dry cleaning, cleaning wool piece goods, and many other extraction processes, including de-caffeination of coffee.

Getting into another field, it is also used as an anesthetic for childbirth and for dental operations. There is an increasing use of it in that field.

Q. How long has Du Pont been manufacturing Tri, Mr. Shepherd?

A. Since 1930.

Q. Now this is only percentagewise, but I would like to ask what percentage of sales in 1951 came

from the sale of Tri solvent extraction of oil meal or oil from soybeans, as compared to the total sale of Tri?

A. As far as Du Pont's sale was concerned, it was well under one per cent. It was actually under one-half of one percent of our total sales.

Q. What other companies other than Du Pont in the year 1951 were engaged in the manufacture and sale of Tri?

A. The Detrex Corporation had two plants, the Dow Chemical Company and Niagara Alkali Company.

Q. Mr. Shepherd, are you familiar with the records of Du Pont Company, with regard to receipt of an order from customers and the billing out of the invoice on receipt of confirmation therefor?

A. Yes, sir.

Q. Are records customarily made by the company in each and every instance, as to every order and every invoice?

A. Yes, sir.

Q. I now hand you a sheaf of papers, and ask you were they received, please, sir.

A. Let me look at them, please.

Q. I hadn't finished, Mr. Shepherd. This is a duplicate copy of the entry of the order received. This is not the—

A. That is correct. This is a duplicate copy, and it was made from the original entry.

Q. And it concerns what company?

A. This order concerns the Magnolia Soy Products Company.

Q. Is that taken from the company's files?

A. This is from our files, yes, sir.

Q. Is that the original or a carbon copy retained in the company files?

A. That's a carbon copy.

Q. What is the blue sheet attached to that, Mr. Shepherd?

A. That is a copy of the shipping invoice sent from the factory.

Q. Where was the factory located that shipped out the Tri down to Magnolia?

A. It was located at Niagara Falls, New York.

Q. In what state was the order for that shipment made that came down to Magnolia, of Tri in November of 1951; in what state was that order accepted and confirmed in?

A. That order was accepted and entered in New York City, New York, and confirmed from that same office, that is, acknowledgment was made of it from the same location.

Mr. Thomas:

If Your Honor please, we would like to introduce in evidence, this white sheet and the blue sheet just testified to by Mr. Shepherd, as Defendants' Exhibits 11 and 12, and ask that they be marked for identification and received.

The Court:

Very well, sir.

(The documents above referred to were marked as defendants' Exhibits D-11 and D-12 to the testimony of the witness Shepherd for identification, and are received in evidence.)

(Mr. Thomas):

Q. Now Mr. Shepherd, I hand you a third sheet and ask you what this is, please, sir?

A. This is an exact copy of the acknowledgement of the order which was sent to Magnolia Soy Products Company.

Q. In connection with this same order referred to in the last previous exhibit?

A. Yes, sir.

Q. It is an exact copy on the front and the back of that sent to Magnolia Soy Products Company?

A. Yes, sir.

Mr. Thomas:

I believe that is all on direct examination.

The Court:

The witness is with you for cross examination, gentlemen.

Cross Examination.

By Mr. Brooks:

Q. Mr. Shepherd, how many companies were there in the United States using Tri for the processing soybean meal for feed for cattle in 1951?

A. I would say 8 companies, to the best of my knowledge, at some time or other during that year.

Q. Were all of those companies purchasing Tri from Du Pont?

A. We sold all of those companies at one time or another. I couldn't say whether they were purchasing their full requirements from us or not.

Q. Well, let's say on April 1, 1951.

A. I can't tell you that. They may have purchased some part from another supplier. We have no way of knowing that.

Q. Name the other suppliers of Tri in the United States, Mr. Shepherd.

A. At the present?

Q. The manufacturers of Tri.

A. You mean at the present time?

Q. No, in 1951.

A. Well, Hooker, Detrex, Niagara Alkali, and Dow Chemical Company.

Q. To your knowledge, did any of those companies sell Tri to any other of the eight mills that you mentioned?

A. I don't know, in 1951. Detrex sold Tri to one or more of those mills before '51, we know that.

Q. Your answer is you can't state positively whether or not part of the supply was furnished by one of the other companies that you just named, one of the manufacturers?

A. No, sir.

Q. How many companies were there in the United States using the Tri method for processing meal for cattle feed at the end of 1951?

A. I have no certain knowledge of that. I would say most of them, that is all that I could say.

Q. At the end of 1951?

A. To the best of my knowledge, one company.

Q. To your knowledge, is any company in the United States, using the Tri process for manufacturing meal for cattle today?

A. No, sir, to the best of my knowledge, they are not.

Q. Mr. Shepherd, Mr. T. J. Milligan was one of your assistants in the years of 1949 and '50, was he not?

A. Yes, sir.

Q. Well, I hand you what purports to be an inter-office memorandum of the defendant, consisting of two pages; have you ever seen that before?

A. I believe I have seen it.

Q. Well, would you say that that was taken from the files of the defendant, Du Pont?

A. I don't know where that was taken from, sir.

Q. Well, is it part of the records of the defendant, Mr. Shepherd?

A. It should be.

Q. Do you know whether or not it is?

A. We only keep trade reports for three years, at which time they are sent to our hall of records.

Q. Well, do you know whether or not this was sent to me by your company?

A. No, sir, I do not.

Q. But you do say it is an inter-office memorandum of the defendant?

A. Yes, sir.

Mr. Brooks:

I would like to offer this as All Plaintiffs' Exhibit No. 66. I think would be the number, if the Court please.

Mr. Thomas:

If Your Honor please, Exhibit 66, that is, All Plaintiffs' Exhibit 66, Du Pont objects to its introduction, for the reason that it has not been sufficiently authenticated or identified, and our further objection is that the person who made the statement is not present in the Court for examination.

The Court:

That objection would be overruled. That has been definitely identified by the witness as being part of the office records. He said he had seen it.

Mr. Brooks:

If the Court please, there are references in this memorandum or record, which I believe the witness said was an intercommunication or an inter-office memorandum, and it starts in headed "L. L. Ford Associates, Greenville, Mississippi.

Interviewed L. L. Ford, President", and its T. J Milligan and dated 7-14-50, using Tri solvent extract.

"The writer called at Greenville, Mississippi, to look over the 100 tons per day Tri soybean extraction plant that L. L. Ford is building for Magnolia Soy Products Company, directly owned by James Warren, formerly a cotton gin operator in Texas, and who now resides in Greenville, Mississippi. Ford constructed that complete plant, including the storage facilities, office and extraction plant for Magnolia. The storage bins and elevators were being erected during the writer's visit, and present indications were they were to complete the construction of the storage facilities so that Mr. Warren can buy fall beans and fill up the storage tank during the time the extraction and processing equipment was being installed, and they seemed to have a design and work very well in hand. He is, however, uninformed on many ideas in plant design. His statement to the writer indicated that he is staking his future on the operation of this plant, and that he considers a successful operation of the plant a prerequisite to any full scale operation to make vegetable oil from beans obtained in the Delta area. The equipment for the extraction plant be

constructed mostly by Davidson-Kennedy Company, who are hydraulic press manufacturers and who have had no previous experience with the construction or operation of an extraction plant. It appears that neither Mr. Ford nor Davidson-Kennedy are familiar with such a plant, and certainly a great share of the design burden, particularly the chemical engineering part, will have to be borne by members of our group, if this plant is to meet with success. Ford is willing, and everybody eager to have our suggestions and cooperation, and everyone seems to want to install a well-designed extraction plant, and apparently many vegetable oil processors who are potential customers in this cotton seed and soybean producing area, and I think we should watch that plant very closely, and will be influenced to order Tri extraction by the Greenville operation there, which will be one of the first large Tri extraction plants, and to keep that from being a failure, we must work with Ford, and do everything we can to keep him engaged on sound basis."

Mr. Brooks:

Mr. Shepherd, did you ever look into the scientific work in Europe on the question of the result of Tri meal being fed to cattle?

A. I read the report by chemists and toxicologists on those works. In fact, there were many experinents in Europe, and a good many men worked on this subject.

Q. That's true, there were a great number of scientists who worked on this particular subject over there for a number of years, isn't that right?

A. There were a number, yes.

Q. And on the whole, don't those works establish that the experiences in Europe with Tri extracted fed meal was very harmful to cattle?

A. No, not at all.

Well, now, the fact is, that that work that has been done where they have observed Tri meal and other feed, indicates maybe some association and gives no evidence of our product, as well as others using Tri extracted meal, have been injurious to cattle. As a matter of fact, one person there has been operating a Tri extraction plant for soybeans, but their actual operation of Tri plants for soybeans in Europe has not produced any of those bad results that you speak of.

Q. All right, Mr. Shepherd, do you know what recommendation as to the amount of that feed that should be given to a cow at one feeding?

A. They have had no difficulty in recent years, and we are in communication with them, and we have advised them of conditions here, and told them of this outbreak, and that we were stopping this program until we could find out if the meal has toxic factors, but over there, they have had no complaint.

Q. During the period 1940 to 1950, is it not a fact that a shipment did show that meal was very harmful, weren't you talking about that very recent experiment, although now they have reduced the feeding to the proper quarter pound or half pound a day?

A. No, I know nothing of the feeding level which you mentioned.

Q. You don't know about those things?

A. No, sir.

Q. Now after the so-called Cornell reports were in, did you or did not Du Pont have any submitted between that date, which was in 1938, '39 or '40, whenever this report was published?

A. That was in 1941.

Q. To 1950, did Du Pont conduct any other experiments in that country?

A. No, sir.

Q. None whatever?

A. We were not actively engaged or even interested in 1947. By that time, mills operating, feed mills, were the ones in the field.

Q. When the University of Iowa first started experimenting in this field, when was that?

A. I don't know.

Q. Well, you are aware that Iowa State College has done some work in that field, are you not?

A. I would state that Iowa College had done some of the work in that field, is that what you asked?

Q. Yes.

A. Yes, sir.

Q. When did it start experimenting in that field, Mr. Shepherd?

A. In connection with hemorrhagic disease of cattle?

Q. Yes, as a result of feeding Tri processed meal to cattle.

A. Well, I would say in 1950, to the best of my knowledge.

Q. 1950?

A. Yes, sir.

Q. Is it not a fact that starting approximately 15 years ago, that experiments were made in this field?

A. What?

Q. That experiments were started on this subject by Iowa State College approximately 15 years ago?

A. Well, I misunderstood your question. They worked mainly with equipment.

Q. Well, didn't they conduct a controlled feeding experiment with a herd for a year?

A. I wouldn't call that a controlled experiment at any time. They merely used a fellow's barn and fed his herd.

Q. With regard to this outbreak in Colorado, did you ever send a copy of a report of that outbreak to Magnolia Soy Products Company, covering that incident, and on the outbreak, with the exception of the statement contained in the letter of T. J. Milligan, July 11, 1950?

A. I didn't say that we did. I don't think we did on that occasion.

Q. Do you recall about when Mr. Milligan brought on that last occasion that we talked about?

A. Not exactly.

Q. Now look at Exhibit 20. There is in evidence in this case, as All Plaintiffs' Exhibit No. 20, a letter signed by T. J. Milligan, on the letterhead of E. I. Du Pont De Nemours, dated August 11, 1950, and in that letter, he mentions the matter of the Colorado incident; will you please read that paragraph on page 2, the second paragraph of the attachment on page 2. Read it please.

(The paragraph was read.)

Q. You read the second paragraph?

A. Yes, sir.

Q. And in May a resolution was adopted as a result of that outbreak, wasn't it?

A. A resolution was adopted later on, yes.

Q. That—Do you know whether that later on there was an appendix—or can't you state whether or not you know that in that appendix, there was a reference to the Colorado outbreak, Mr. Shepherd?

A. That's a reference to the Colorado outbreak in that letter, sir.

Q. It was?

A. Yes, sir, it was.

Q. And this is the only report that the defendant ever submitted, the only reference that was ever made by the defendant to Magnolia of the Colorado outbreak?

A. I wouldn't say the only reference; maybe the only written report.

Q. Mr. Shepherd, when did you first hear of the outbreak in Minnesota in the year 1951?

A. In the early spring.

Q. Could you be more accurate in that statement, please, sir?

A. I am not sure, but I know it was in the spring, and as I recall, it was either late March, probably late March, or early April. That's as close as I can pin it down.

Q. Did you hear of the outbreak in January of 1951?

A. No, sir.

Q. You heard nothing about that?

A. To the best of my knowledge, no.

Q. Did you ever hear of the deaths of 41 cows and calves in the Glencoe area in Minnesota by April 26, 1951?

A. I don't remember the number, but I heard of that outbreak by April 26.

Q. Did you know of the mortality in a herd, that out of 30 cattle in Glencoe, that 22 died; that's in the Glencoe area in Minnesota, by the end of June, 1951?

A. That was when we were investigating those incidents.

Q. Did you ever receive a report at that time from the University of Minnesota?

A. We were in constant touch, either by letter or personal visits, with the University of Minnesota.

Q. When did you first hear of the death of the calf that died on July 9, 1951, the calf, one of these calves used by Doctor Twehouse and Leasure in their experiment that started approximately in April?

A. Well, I couldn't recall the exact date. It would probably be in early August.

Q. You were receiving frequent reports from the University of Minnesota by that date, were you not, Mr. Shepherd?

A. Research work hadn't progressed far enough to have a written report to it. We got some verbal reports by then.

Q. To your knowledge, has the defendant ever sent a copy of any report from the University of Minnesota to Magnolia Soy Products Company, or any of its officers?

A. Not to my knowledge. As I say, I don't recall getting a report from Minnesota in 1951.

Q. Do you know whether the 41 cows and calves that I just mentioned that died by April 26, 1951, were mentioned, or that fact made known in writing to the Magnolia Soy Products Company or any of its officers?

A. In the letter of July 31, we referred to the Minnesota experiment.

Q. Is there any reference in your letter of July 31 with regard to the number of cattle that died in Minnesota?

A. That was one of the reasons for sending Mr. Armstrong with that letter.

Q. Mr. Shepherd, is there any reference in your letter of July 31 as to the number of cattle that died in Minnesota?

A. No.

Q. None whatever, is there?

A. No, sir.

Q. Did you send any of your assistants to the Glencoe mill in Minnesota?

A. Yes, sir.

Q. Are you aware of the operation of that mill?

A. I am not personally.

Q. Was it an efficiently operated mill?

A. To the best of my knowledge, it was.

Q. Have you any knowledge of the heats maintained by that mill?

A. Not personal knowledge, no.

Q. Do you know whether the defendant's records show that you knew the heat maintained by that mill?

A. I can't specifically state that our records do indicate that that was known. I can state that mills made by Crown did give very complete heating or toasting.

Q. You just testified it was an efficient plant?

A. Yes, sir, to the best of my knowledge.

Q. Well, do the records of the defendant show that the mill maintained heat in excess of 240 degrees Fahrenheit?

A. I can't answer that. I have no knowledge of that.

Q. Well, do any records of the defendant show what heats were maintained in that place?

A. They might. I don't know.

Q. Most of the cattle that died in Minnesota in 1951 were in the so-called Glencoe area, is that true, Mr. Shepherd?

A. Well, they died in the Minnesota area in several points.

Q. You don't know whether the deaths occurred in the so-called Glencoe area?

A. I know som of them did, yes.

Q. And a great deal of Tri meal that had been sold in the field out there vas the output manufactured by this Glencoe mill, isn't that correct?

A. That was so.

Q. Now you referred in your letter of July 31, 1951, the letter that was delivered by Mr. Armstrong to Mr. Ford and Mr. Reed; after that date, did you have communications with Magnolia or any of its officers, Mr. Shepherd?

A. I did not.

Q. By letter or by phone?

A. No, sir.

Q. Did you ever make any inquiry even as to whether that mill was producing soybean meal, did you ever inquire as to whether or not it might be selling some of that for feed for cattle?

A. I did not.

Q. You just washed your hands of the whole thing after July 31, 1951, didn't you, Mr. Shepherd?

A. No, sir.

Q. Do you know if the defendant sold more Tri to Magnolia in November of 1951, do you know about that?

A. I know we made a shipment in November in 1951.

Q. You referred to a resolution here by the National Feed Association, now did you after July 31, on the drum or in any way label your process that you sold Magnolia?

A. I don't know.

Q. You don't know whether you did or did not?

A. No, sir.

Q. You knew that cattle was dying in Minnesota, you just testified

A. We heard that they were in Minnesota in some areas.

Q. You are head of the Chlorine Products Division.

A. Yes, sir.

Q. And you didn't even know whether your company was putting a label on the drums that they were sending to Magnolia, drums of Tri, I mean?

A. I don't know. I expect they did without my knowledge.

Q. Are we to understand that you did not think it important enough to know whether your drums were properly labeled?

A. It never occurred to us that Magnolia would do other than what we had suggested in our letter.

Q. You did not think it important enough to label your drums was my question, Mr. Shepherd, drums of Tri that you were shipping, after you knew cattle were dying in Minnesota and other places?

A. I say it just never occurred to us that Magnolia wouldn't follow our instructions. Other mills without any further instructions from our part about the meal, followed the suggestion of the letter that we sent dated on July 31, and we never inquired of a mill where they sold their products or why. We have no authority to tell a mill where to sell. That would be presumptuous to question the integrity of any of our responsible customers in that manner, and we didn't do it. We simply supposed that they followed the suggestions of the letter of July 31, which were very plain.

Q. Mr. Shepherd, now these other companies that you referred to, did you cooperate with them as close-

-ly as you had with Magnolia, its officers, I mean as you did with the officers of Magnolia, prior to the construction of their plant?

A. Insofar as our company was concerned, we always complied and gave such companies any assistance as to the solvent recovery plants, that is, the erection of plants using Tri as a solvent for the extraction of meal, and naturally we gave them the best advice we could as to the proper erection of that solvent recovery plant.

Q. Now your assistance to those companies, was that assistance in writing of the same type of letter to them that T. J. Milligan wrote to the incorporators and later to the officers of Magnolia?

A. To what letters, Mr. Brooks, are you referring?

Q. I am referring to the letter that belittled all so-called rumors as smear campaigns?

A. That letter was specifically requested by L. L. Ford, and I read the whole letter, and the effect of it is, that those rumors would be minimized.

Q. Well, that letter was written at the request of Mr. Ford, you say?

A. It was.

Q. Well, he didn't request what you put in the letter, but he asked T. J. Milligan to put in writing whether any of the rumors which had been circulating were true, didn't he tell you that he just wanted the truth, and that letter of August 11 was the answer; now was that true?

A. Mr. Brooks, I never heard that statement by Ford or saw it either.

Q. Mr. L. L. Ford so testified and it is part of the evidence in the Ladner case against Du Pont at Poplarville, Mississippi, knowing these cases that took place a great many months ago, are you now at this stage, denying that statement, Mr. Shepherd?

A. I deny any knowledge of it.

Q. I hand you a photostatic copy of the letter and report, the report is that of M. O. Shultz of the University of Minnesota, will you examine that and please state if that report was received by the defendant?

A. I did not receive that report personally, and I couldn't say, but this looks though that it could be a copy of the report received by Du Pont. That went to another group, not to me.

Q. You state that was or was not received?

A. I never saw that report personally.

Q. You've never seen this report?

A. No, sir.

Q. You don't identify this photostat of the original as having been received by the defendant?

A. I can't. I never have seen the letter. I think the toxicology lab would be in position to discuss this.

Q. Well, would you say the report was not received by the defendant?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. From looking at this photostatic copy, would you say probably at least they are copies of letters interchanged in the regular course of business by the defendant? Now take a good look.

A. That does show most of a stamp, and on receipt of letters, most of Du Pont's divisions stamp the date on which it was received by that department, and in some cases, the distribution shows on the letters. That has been shown on some of the letters that you have passed to me; some of them, it hasn't. I can't say.

Mr. Brooks:

If the Court please, defendant furnished that photostatic copy to me, and we would like to offer it in evidence.

Mr. Thomas:

We don't object to that. It is not a copy that comes from the defendant's files, but we do object to it on the ground that it is written by a man who is not present for cross examination, and the letter is not authenticated, as to the facts, and we don't see where it could possibly be competent without that person being here, because if he isn't here, why that letter is merely hearsay, if Your Honor please.

The Court:

I think the Court ruled on that the other day that it might be used in cross examination, but it wasn't testimony. Now that ruling was made the other day.

Mr. Brooks:

I don't think, if the Court please, that your ruling applied to a communication such as this.

The Court:

Let me see that. This might be a different situation.

(The document was passed to the Court for examination.)

Mr. Brooks:

If Your Honor please, we have this testimony from Mr. Shepherd, and from Mr. Armstrong. The record shows that he testified that there was a contract entered into with the University of Minnesota, with re-

gard to experiments there; we have testimony from Mr. Shepherd that he received reports, and frequently. Now that is one of their reports, sir, that they gave to me.

The Court:

It is admissible, gentlemen, not so much in as far as the jury is concerned, as to the truth or falsity of the statement, but as to the fact that Du Pont had this information, whether it be true or false. Go ahead.

(By Mr. Brooks):

Q. You say you never read this report?

A. No, sir.

Q. Then you are not in any way familiar with it?

A. Our toxicological laboratory supervises those reports. We don't necessarily read the report.

Q. So you just get reports and don't know anything about them and don't do anything about them?

A. They are channelled to the proper person, Mr. Brooks.

Q. Now Mr. Shepherd, you received a summary of this report?

A. It was probably verbal, except that appears to be an interim report of some sort.

Q. You don't recall receiving any written memorandum of another department in regard to it?

A. No.

Q. Did you know whether that report showed that the experiment divided the cattle into five sections, and they had been considered, and the report showed all of the cattle in Group 3 that were fed Tri extracted meal, that every one died?

Mr. Thomas:

We object to that, if the Court please. That is not admissible to the jury. Someone made that report that is not available for cross examination, and we say that referring to what is said in that report is not competent at this time. This man didn't make the report, and the one who did it is not here for examination, so the report is hearsay.

The Court:

Well, I'll say this to you, gentlemen, whether that is true or false, it's not in issue here, but the fact that the Du Pont people got that report, I think it's competent, and I think you may go ahead and refer to the report, and ask him if that's in the report. Don't ask him whether it is true or false or not, but whether the report came to them, and if you want to ask about it, you can ask if certain things are in it, but do not ask the witness if it is true or false. That has nothing to do with the issue here. The only thing competent is that the report was received and certain things are in it. Go ahead.

Q. Is that statement that I made to which Mr. Thomas objected in this report or not, Mr. Shepherd?

A. I don't know.

Q. Now, Mr. Shepherd, will you please look at that report, and see if the statement I just made is reflected in that report.

(After examining the report, the witness replied):

A. Yes, it does.

Q. It does contain that statement?

A. It contains the statement that all animals in Group 3 died

Q. Do you know whether a copy of that report was ever sent by the defendant Du Pont to Magnolia Soy Products Company or any of its officers, Mr. Shepherd?

A. According to the date on that report, I didn't receive it until July of '52—no, I beg your pardon, I didn't receive it until—it was in July, and by that time, Magnolia was not operating.

Q. My question was, do you know whether or not the defendant sent a copy of that report to Magnolia Soy Products Company?

A. Not to my knowledge.

Mr. Brooks:
That is all at this time.

The Court:
Is there any further examination of this witness?

Mr. Thomas:
What did you say, Mr. Brooks?

Mr. Brooks:
I said that was the last question.

Mr. Thomas:
We have nothing further.

The Court:
Then you may be excused, Mr. Shepherd.

(Witness excused.)

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If the Court please, at the close of all the evidence in the case, defendant Du Pont here makes a motion for a directed verdict in its favor as to the entire case in all counts, and asks permission of this Honorable Court to have formal written motion in this regard filed with the reporter and made a part of the record as if dictated the specific grounds therein.

The Court:

You are given permission, of course, to do that.

Mr. Thomas:

All right, sir; and I believe the ruling of the Court was overruling that motion.

The Court:

Yes, sir; I do not think it is a case for a directed verdict.

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Mr. Thomas:

If Your Honor please, this Honorable Court now having overruled the motions for a directed verdict in behalf of the defendant, defendant Du Pont now moves for a directed verdict as to the contract counts, namely counts one, two,--inasmuch as Count three is now deleted from the case and asks permission of this Honorable Court to file a formal written motion in this regard, setting forth the specific grounds therein.

The Court:

Very well, you may do so.

Mr. Thomas:

I will likewise file that motion with the reporter and with the clerk.

The Court:

Very well.

(Motion for directed verdict as to the contract was filed as part of the record in this case.)

The Court:

Of course, that is also overruled, gentlemen. I neglected to say that.

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The Court:

Take this, Mr. Reporter:

Now, Gentlemen of the Jury, after a long and tedious hearing which has been somewhat enlivened by the testimony of Mr. Souza and others, this matter has come to the stage where it becomes my duty to charge you with respect to the law therefor and to briefly review for you the evidence which has been introduced.

I do not want any misunderstanding with me or you gentlemen or with counsel because at times throughout this proceeding we have had a little levity connected with it in connection with some of the rather peculiar testimony, that is the peculiar language, that the Court does not regard it as a very serious matter or that you should not regard it as a very serious matter. There are serious rights of your fellow citizens and those rights are entitled to your

most serious consideration, as I have tried to give them my serious consideration.

It seems to me that there are certain matters in this law suit which stand out so clearly and unequivocally that there can be no serious question, as a matter of fact, no question under the evidence.

This picture has been presented to you, as I have said before out of your presence, very much like a person who is undertaking to work a jig saw puzzle. You put in a piece here and a piece there, and a piece there, and a piece there and finally you have the full picture appearing.

Now to me it seems there can be no question in the world under this evidence that long before, or for a considerable period of time before the unfortunate events which we have been called upon to pass on occurred, that there was in the oil meal industry and in those who supplied that industry both with machinery and with chemicals, an effort to find a more satisfactory process for the manufacture, particularly in that type of manufacture which was based on a chemical extraction process. That was based on two factors, first, probably a more satisfactory recovery of the solvent extract; but primarily to reduce the fire hazard, the explosive hazard. The type of chemical which had been used up to this time largely was quite volatile, quite prone to explode, and there was thus a seeking among those people interested in this subject to define some type of a solvent which would be less explosive. I dont think there could be any question in the world in any reasonable man's mind that the defendant Du Pont here was interested in that under the evidence in this case; that they were seeking along with other people to bring this result about and that their motive while it was good

was not an eleemosynary motive, but was brought about by their desire to be able to sell more of the particular chemical involved here, trichloroethylene, which is frequently referred to in this record as "tri".

There can be no question in the world under the evidence in this case, as I see it at least, and as I think any reasonable man would see it, that they collaborated with the people, Mr. Reed, Mr. Ford, and possibly others who were interested in establishing the Magnolia Soy Bean Products Company at Greenville, Mississippi. There can be no question in any reasonable man's mind that as the result of their investigation, I am sure made in good faith, but at the same time the representation was made, that trichloroethylene processed soybean oil was a safe product to be used in the feeding of cattle. I think there is one letter in the record from the defendant in which they said, practically said they would stake their reputation on that being a fact.

Therefore, there are to my mind, and I think in any reasonable man's mind, certain things that are definitely and specifically established by the evidence in this case. That is that Du Pont did hold out to these people that they could manufacture trichloroethylene extracted soybean oil and it would be safe for cattle feed; that they did so manufacture, that in the processes of trade certain of their products marked 'Magnolia Soybean Meal" through a broker in Memphis, a Mr. Brodie, were eventually sold to Waldron, Limited, in Honolulu, by Waldron Limited to the Sokei and Hilo Dairies, and that as a result of the feeding of that meal these cattle died. I do not think any reasonable man could come to any other conclusion about that.

I further think, and tell you as a matter of law in this case that although as yet the chemists have not been able to say just precisely what the chemical reaction is, that in this case the evidence overwhelmingly shows that the feeding of trichloroethylene extracted soybean oil under certain conditions does kill cattle, give them this hemorrhagic disease, not in all instances, but in some instances does kill cattle and that that was the cause of the death of the cattle that are involved in this lawsuit.

The very serious question which arises in this case, and in my judgment the case is to be determined by what you gentlemen may think of the factual situation which arises here with respect to the effect of the letter which was sent by Du Pont to Magnolia Soybean Products Company on or about August 1, 1951, I believe is the date,—

Mr. Thomas:

It was written July 31 and delivered August 3, 1951, Your Honor.

The Court:

Well, I say it was delivered on or about August 1, 1951, to Mr. Reed, and was a letter written by Mr. Shepherd and delivered by Mr. Armstrong of the Du Pont Company to Mr. Reed and his associates. You recall what the letter said. That, by the defendant is alleged to have broken the chain of causation in this case. If it did not break the chain of causation from the legal standpoint in this case, I think your verdict would bound to be for the plaintiffs in this case. If it did break the chain of causation then your verdict should be for the defendants in this case.

Now the breaking of the chain of causation is a somewhat complicated matter, one that isn't very easy to define, but I think this is a reasonably accurate statement. That you gentlemen should take into consideration the facts and circumstances as you may find them in connection with the delivery of that letter. Take into consideration the letter itself, what Mr. Armstrong may or may not have said to Magnolia Soy Products Company at the time the letter was delivered and what they may have said to him, those being disputed issues in this lawsuit; the testimony, the testimony with respect to which I will briefly review for you in a little while.

If you should believe from a preponderance of the evidence in this case, that the defendants sold tri solvent to the Magnolia Soy Products Company knowing that it was to be used by that company in the manufacture of soybean oil for sale in Interstate Commerce as cattle feed, and that the action of the defendants prior to the sale of the soybean meal which was ultimately purchased by plaintiffs and used in feeding their cattle, or prior to the time when they received the same in the Territory of Hawaii, were not such as would have caused a reasonably prudent man to desist in selling such meal for cattle feed, or was such that a reasonably prudent man in the position of the defendant knew, or should have known that the said company, that is, referring to Magnolia Soy Products Company, would continue to sell said meal in interstate commerce for cattle feed and would not have regarded the sale of this meal, tri meal, for cattle feed by said company, again referring to the Magnolia Soy Products Company, or I should say Magnolia Soybean Products Company, as extraordinary under the circumstances, then your verdict would be for the plaintiff.

Now the factual issue on that, gentlemen, you have heard the letter read, so you know what the letter says. Mr. Ford in his deposition said that when that letter was brought to him he was shocked and indignant and that he said to Mr. Armstrong "What do you mean by this? You let me put $500,000.00 here in the operation to produce a mill to operate by this process. You know I can't sell this for hog feed or poultry feed, I have got to sell it as cattle feed. Do you mean to tell me that I have got to stop doing that?"

He says Mr. Armstrong told him "no, we don't mean that; but there have been some rumors circulated about it and we thought you ought to know about those rumors", and that is about the sum and substance of what we mean to say to you."

Now Mr. Armstrong in his testimony given here before you denies that entirely. He says he didn't make any such statement as that. That is a factual question, gentlemen, for you to determine as to which one of those witnesses you believe about it. And it is for you to conclude under the definition which I have given you whether that was a break in the chain of causation in this case. If it was, then your verdict in this case should be for the defendants, if it was not, your judgment in my opinion should be for the plaintiffs. That is the question which you gentlemen are to determine.

The plaintiffs in this case came in here as do all plaintiffs in lawsuits come in with the burden of proving his case by a preponderance of the evidence, not as in a criminal case beyond all reasonable doubt and to a moral certainty, but by a preponderance or greater weight of the evidence. That applies throughout this lawsuit and to the question of damages of

course. If you do not feel that the plaintiffs are entitled to win this lawsuit, the form of your verdict would be, "We, the jury find for the defendants." If you do think the plaintiffs are entitled to win this lawsuit, and you will bear in mind, gentlemen, that we have tried three separate cases here as one, because they were all dependent generally upon the same question of fact, the only difference in the three cases is if you think the plaintiffs are entitled to prevail, is in the amount of damages to which they are entitled.

If you should think that the plaintiffs are entitled to prevail in this lawsuit you would then you would pass to the question of how much each of these plaintiffs have been damaged in this lawsuit. You will bear in mind that the plaintiffs are two dairies operating in the Hawaiian Islands, and the plaintiff, Waldron, Limited, which is a concern there under this evidence which deals largely in feed.

The first one of the plaintiffs which I will refer to here is generally referred to in this record as the Hilo Dairy. These people under the evidence in this case had fifty-one cows that died, they had forty-four milking cattle whom they testified were badly damaged in their milk production and in their value as a result of the feeding of this particular brand of meal. In addition to their losses in the death and the damage of their cattle, they claim losses with respect to loss in business, and also some loss with respect to the trade value there, the trade name. They had medical expense according to this evidence in connection with this matter of $4,990.00. The testimony of those particular people with respect to the values of their cows were that their milking cows, their reasonably good milking cows, had a value of

approximately $800.00 apiece. They had two cows which they said had a very special value, one of which it was testified to, was producing about twelve gallons of milk per day, a very fine Holstein cow and a calf from that cow which gave great promise, which they say was worth, each of those they say was worth $5,000.00.

The Sokei Dairy had fifty-two cows which died, they had fifty-one calves that died, thirty of which were bull calves and twenty-one were heifers. They say their milking cows were worth about $800.00 apiece; that the bull calves were worth about $200.00 apiece and that their heifer calves were around $400.00 apiece. Practically all of the cattle involved, not absolutely so, but from a practical standpoint you could say they were all Holsteins, there were a few Ayrshires and Guernseys mixed in, but the bulk of this lot of cattle were Holstein cattle.

You heard the testimony of a good many witnesses as to why cattle on the Hawaiian Islands were higher in price than they were on the mainland. In the main they had to be purchased here. There was quite a large item of freight, transportation and so forth involved; there is a good deal of testimony from other people in this lawsuit with respect to cattle somewhat if not entirely similar in character with respect to the value of cattle down there. Those estimates ran, as I recall them, and I think I am fairly accurate in that, all the way from some as low as $400.00 up to maximum of about $800.00. Now those are things for you to take into consideration in determining, if you should decide the plaintiffs are entitled to recover in this case, what their recovery should be.

Mr. Waldron, or Waldron, Limited, the firm down there, seems to have accepted as a fact that they

would be liable in this case if sued. They have made settlements with a number of people down there in the islands which, as I understand counsel, have been agreed are reasonable settlements. I have made no notations about that, I take it that counsel has those figures, and those, of course, would be elements of damage as far as they are concerned. They testify that they lost quite a good deal of business, that they were very much embarrassed by the fact that they unwittingly, as they say, had put out meal for cattle which proved to be poisonous, that it seriously damaged their business; that they lost business because of it; that the reputation of their firm has suffered because of it; that they had to spend quite a good deal of money in putting their salesmen out and their officers out to try to counteract the bad impression which had been left by this. All of that is for you gentlemen to determine if you should think they are entitled to recover and fix for them a reasonable value for what they have lost.

There might possibly be in this case, under the evidence, a question of the loss of prospective profits. I do not think you gentlemen ought to consider that. The prospective profits phase of it I think is entirely speculative and ought not to be considered, but if you should determine from the evidence in the case that the plaintiffs are entitled to a recovery, they are clearly entitled to recover at your hands the full, fair, cash market value of the losses which they suffered, the use of their employees and their officers and any extra work that they were put to in connection with this in addition to the actual loss from the death of cattle and from claims which they have been compelled to admit that they owe and which they have obligated themselves to pay.

Now, gentlemen, I think in as simple language as I know how to use, language which is the layman's language rather than the lawyer s language, language which I think you can understand better than if I used a lot of high sounding and legal phrases. I have stated to you gentlemen what the issues in this lawsuit are. Your duty in the matter is simply this.

Du Pont, as you know without me telling you, is a very large corporation. They are engaged in many lines of activities. There is nothing wrong about being a corporation. There is nothing wrong about being a big corporation and doing a big business, and you ought not in this lawsuit to be prejudiced against Du Pont because of it, because of the fact that it is a big corporation and does do a big business.

On the other hand you should in no way in the world be prejudiced against the plaintiffs in this case because they are a long, long way away from us. They are people that you know little about, but they are citizens of the United States, and they are entitled to every right and every privilege of a citizen of the United States, including the right to have 12 of their fellow citizens fairly pass on their lawsuits when they come before them.

Now there is your situation. Take this evidence, do your best to ferret it out and then reach what in your judgment is a just and fair verdict, and neither I, nor the plaintiffs, nor the defendant, nor anyone else will have cause to complain.

Are there any exceptions or objections, gentlemen, to the charge as given or any requests for any additional instructions?

Mr. Brooks:

May we have two or three minutes, Your Honor, for a brief consultation?

The Court:
Yes, sir.

(Whereupon a short consultation was had by plaintiffs' counsel at the conclusion of which Mr. Tavares said):

Mr. Tavares:
May we at this time impose upon the Court by asking for a short conference in chambers?

The Court:
Yes, sir.

(Whereupon a conference between the Court and counsel for all parties was held in chambers, and at the end of the conference the parties returned to the Courtroom and the Court said):

The Court:
Gentlemen, there are some other very short matters which I overlooked or did not charge you about which I should.

For the benefit of some of you gentlemen who possibly have sat on juries in State Courts, where the nine jury verdict prevails, I charge you that in this case the verdict must be the verdict of all twelve of you, it can't be a verdict in this Court unless all twelve jurors agree.

There is one further matter which you probably need to have clarified for you. There is some little reference in the evidence in this case to the fact that in connection both with the Hilo Dairy and with the Sokei Dairy that the plaintiff Waldron in this case advanced certain sums of money to them. That you

shall not take into consideration with regard to Hilo or to Sokei; if you should think they are entitled to prevail, your verdict would be for such damages as you think they have suffered, not taking into consideration at all any advancement which may have been made to them by Waldron. That matter would have to be, and would be adjusted by the Court. You would take that into consideration on this one narrow question in this lawsuit and that question alone. That is the question of whether or not the making of those advances took from Waldron the use of a considerable sum of money and put him in a tight credit position where he was not able to advance credit to his customers as he heretofore had and whether he suffered loss on account of it. It is competent for you gentlemen to consider it on that question, but that question alone.

Mr. Thomas:

I believe the Court asked if there were any objections or exceptions.

Mr. Brooks:

That is correct, you go ahead.

Mr. Thomas:

No; you are first.

Mr. Brooks:

I merely want to say to the Court in view of the conference we just had in chambers, a change must be made in those charts, sir.

The Court:

Very well.

Mr. Tavares:
That is all at this time, I believe, sir.

Mr. Thomas:
Your Honor, may I just briefly dictate the exceptions, sir?

The Court:
Yes, sir.

Mr. Thomas:
With utmost deference to this Honorable Court, the defendant objects to and takes exception to the statements made by Your Honor attributed to Mr. Armstrong which amount or might reasonably be said to amount to a deviation from the letter of July 31, 1951, delivered on August 3, 1951.

The Court:
Very well.

Mr. Thomas:
The exceptions are overruled, aren't they, Judge?

The Court:
Yes, it is overruled, because as I have said to you gentlemen, and I say to the jury, this letter stands as it is written, gentlemen, nothing that Mr. Armstrong said detracts from or adds to the letter as a letter. Mr. Armstrong, whatever you gentlemen may find he said or didn't say, is admissible in this case only as a statement from an agent of the defendant in this case, and does not in any sense of the word undertake to change the language of the letter.

Mr. Tavares:

For the record, Your Honor, may we most respectfully raise the question of law by excepting to the Court's ruling, ruling out possible prospective profits?

The Court:

Yes, sir, you may do that.

Now as I understand you gentlemen, you think you can reasonably cover your case in an hour argument to the side. That you will be given. Mr. Marshal, you will keep the time.

Now perhaps in a little more spirit of levity than a Court ought to indulge in, but we have had enough serious situations in this matter, I think a little levity might not be out of place.

I took a contract a long time ago with the Government of the United States to act as a Judge and preside over trials. I have never considered that contract as binding me to listen to all of the arguments of counsel presented to a jury, that is the unfortunate province of the jury in this case, and I am not going to sit here and listen to it all. I am going to be right back here, though, but I think I know you gentlemen well enough to know that you will stay within the record and the instructions of the Court, but if any question arises about the propriety or lack of propriety of the arguments in this case, I will be within earshot and you may call me, but I absolutely refuse to sit here and listen to you gentlemen argue the case to the jury.

(During the course of Mr. Brooks' argument the following colloquy and ruling by the Court occurred.)

Mr. Brooks:
—"the veterinarian's bill out there—"

Mr. Thomas:
If Your Honor please, we object to the use of charts inasmuch as they were not prepared or formulated during the evidence in this case.

The Court:
Well, do you contend that they do not conform to the evidence in the case?

Mr. Thomas:
We haven't even seen them, Judge.

The Court:
Well, look at them and then answer that question.

Mr. Thomas:
All right, sir.

(Whereupon counsel for defendant examined the charts being referred to by counsel for plaintiffs.)

They reflect the damages which are complained of and claimed in the complaint, but we submit that there are certain items of damages claimed, for instance in support of which there is no evidence supporting it. For example this "General Damages, $30,000.00."

The Court:
What theory is this "general damage" based on, Mr. Brooks?

Mr. Brooks:

General damages, Your Honor, the same as all general damages; just as to any emergency or anything unforeseen as might happen in the future. General damages, I think the Court will agree are always allowed in such cases.

Mr. Thomas:

We submit that unless it conforms to the proof, Judge, the charts here, merely setting forth the complaint, balloons it out of proportion and prejudices the defendant in this case.

The Court:

Well, now gentlemen of the jury, if I correctly understand the situation, this chart here is merely a method of calling your attention to the evidence in the case. I think it is competent for that. The chart in itself is no evidence in the world, and your verdict in this case is to be based on the evidence, and this is merely a method that counsel is using to undertake to call to your attention what the evidence in the case shows.

Mr. Thomas:

Would that be counsel's recollection of the evidence, if Your Honor please, or the evidence?

The Court:

It is counsel's recollection of what the evidence shows. Of course the jury can judge what the evidence was, and this is merely a method of counsel, as I understand it, to call the attention of the jury as to what he claims as damages and what he claims the evidence shows. If the jury does not agree with

him that the evidence shows that, why of course the jury will take the evidence and not the chart. I think it is competent for that, but for that only. It in itself, of course, gentlemen, is no evidence in the world. The evidence given you here from the stand and from the depositions in the evidence which shall control.

All right, gentlemen, you may begin your arguments after we come back here from lunch. Court will now take a recess until 1:45, at which time the arguments may be concluded.

Gentlemen, you will follow the same instructions which I gave you the first day of Court, which I am sure are not necessary, but I call your attention to them just the same.

Court is now in recess until 1:45 p.m.

(Whereupon, Court adjourned at 12:05 p.m., until 1:45 p.m., Tuesday, November 29, 1955.)

Afternoon Session.

(Following the noon recess, Court reconvened and the trial was resumed.)

The Court:

All right, gentlemen, you may continue.

(Whereupon, the arguments were concluded, at the conclusion of which, the Court said):

The Court:

Now before the jury takes this case for its consideration, I wish to express publicly my appreciation to the jury for their attention, and I particularly wish to express my appreciation to counsel in the

case. They have been courteous to each other and to the Court. They fought for their clients rights and while they fought hard, they fought fairly, and for the most part it has been a friendly combat. The case has been well handled and to you gentlemen, I express my appreciation. It is a privilege to try a lawsuit such as this.

Now, gentlemen of the jury, since I charged you this morning, I have had the reporter read back the charge and I make no change with one or two minor exceptions.

It is a little difficult for a man sitting here and talking and then see his words precisely as he said them, and I notice I did in one or two instances use the words "oil", or "soybean oil" for use as cattle feed. I am sure you knew I meant "soybean meal". That is the only thing that I make a change in my original charge to you.

Now I instruct you just this much further, gentlemen. If you should believe from the preponderance of the evidence in this case that the plaintiffs are entitled to prevail, the form of your verdict would be this:

"We, the jury, find for the plaintiffs and fix their damages as follows"—

and then set out what you think Hilo Dairy is entitled in your judgment to recover, then how much as to Sokei Dairy and how much Waldron, Limited is entitled to recover.

If you should feel that the plaintiffs have not borne the burden imposed by law in proving their case by a preponderance of the evidence and the plaintiffs are not entitled to recover, the form of your verdict would be

"We, the jury, find for the defendant."

Now I will give you gentlemen these two forms of verdict and you will use whichever one you feel is proper.

Now, gentlemen, you may retire to your room and begin your deliberations.

(Whereupon the jury retired.)

Th Court:

Mr. Reporter, take this into the record.

There were presented to the Court in this case a number of instructions requested for the plaintiffs and for the defendants which the Court will hand to you and which shall be marked as "Proposed Instructions" in this case.

The Court has considered these instructions and while quite a number of them are correct theoretical statements of law, the Court did not give these instructions because of the fact that under the very limited factual situation which the Court found existed in this case, the Court was of the opinion and still is of the opinion that the jury would get a more intelligent idea of the issue on which they had to pass than it would have if the Court had read certain of the requests to charge couched in more or less legalistic language.

Mr. Tavares:

If the Court please, may we withdraw the instructions requested and sign them I don't believe we did that, and I think it is required.

The Court:

Well, you may do it if you wish There is no reason why you shouldn't.

(Whereupon, the plaintiffs' requests to charge which were denied by the Court were withdrawn and signed.)

Mr. Brooks:

And may it please Your Honor, may we be permitted to except to the Court's ruling in denying the submission of the Proposed Instructions to the jury.

The Court:

Oh, certainly, gentlemen, you may have an exception to that. You have a right to except to any ruling of the Court.

Mr. Brooks:

Thank you, sir.

(After deliberation, the jury returned into open Court the following verdict):

The Court:

Gentlemen of the Jury, have you reached a verdict?

The Foreman:

We have, if Your Honor please.

The Court:

Pass it to the Clerk.

(The verdict was passed to the Clerk.)

The Court:

Read the verdict, Mr. Clerk.

The Clerk.

(Reading) "We the jury find for the defendant."

The Court:

Thank you gentlemen for your consideration and for your patient attention during the trial of this rather lengthy case. You have the thanks of the Court, and I hope that we may again meet. You are now discharged from any further consideration of this case. Unfortunately, we have another case to try, so you will just take your places back in the Courtroom.

Mr. Brooks:

If the Court please, we would like to reserve the right to make a formal motion for a new trial at a later date, convenient to Your Honor and opposing counsel.

The Court:

Certainly, sir; you may do that at Oxford when it is convenient to you gentlemen.

Mr. Brooks:

We just wish to protect our rights in the record, if the Court please.

The Court:

I understand.

Well, gentlemen, that, I presume, concludes all matters to be heard at this time.

Court is now recessed for thirty minutes.

(Whereupon the trial in the above-styled cause was concluded.)

• • • • • • • •

ORAL OPINION OVERRULING MOTION.

The Court:

Take this, Mr. Reporter.

In this long and complicated and very interesting lawsuit the Court gave the Plaintiffs what amounted to peremptory instructions on every issue raised in the lawsuit with one exception, that being insofar as liability was concerned.

That was a sharply drawn factual issue as to whether or not the conduct of Du Pont, the defendant in the case, had resulted in a break in the chain of causation. That issue, I thought then and think now, was an issue for the jury.

As I look back over the lawsuit I am inclined to say the Court did commit one error, but it would not be applicable here. I probably confined the Plaintiffs to a too narrow gauge of estimate of damages if found, but the jury found the plaintiffs were entitled to none, therefore, that is not applicable here.

The Court gave instructions requested by the Plaintiffs on the question of the break in the chain of causation word for word as requested.

There were other instructions which were requested and I think they were covered in the general charge to the jury in language which the jury would come more nearly understanding that they would any technical charge which might have been given.

I think the case was fairly and fully presented to the jury and arguments that were made to the jury covered practically every matter which is now being argued here, and the jury found the facts to be against the Plaintiffs in the case.

Therefore, in my judgment, the motion for a new trial would be overruled.

CERTIFICATE OF CLERK.

In the District Court of the United States for the Northern District of Mississippi, Greenville Division.

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v. No. 142-Civil.

E. I. Du Pont de Nemours & Company, a corporation, Defendant.

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,

v. No. 145-Civil.

E. I. Du Pont de Nemours & Company, Defendant.

Fred L. Waldron, Limited, Plaintiff,

v. No. 143-Civil.

E. I. Du Pont de Nemours & Company, a corporation, Defendant.

I, HUBERT D. STEPHENS, JR., Clerk of the United States District Court for the Greenville Division of the Northern District of Mississippi, do hereby certify that foregoing 874 pages is the original of portions of the record in the above styled cases stipulated by attorneys for the parties as the record in said causes on appeal thereof to the United States Court of Appeals for the Fifth Circuit.

Witness my signature and seal of office this 31 day of May, 1956.

HUBERT D. STEPHENS, JR.,
Clerk,
By GENA S. LAMB,
(Gena S. Lamb),
Deputy Clerk

(Seal)

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NOV 14 1957
JOHN T. FEY, Clerk

No. 615

EXHIBIT VOLUME.

TRANSCRIPT OF RECORD

UNITED STATES

COURT OF APPEALS

FIFTH CIRCUIT.

No. 16,140

GEORGE T. NISHIDA and JAMES E. NISHIDA d/b/a HILO DAIRY COMPANY OF KAUAI; RYOJU SOKEI, d/b/a SOKEI DAIRY, and FRED L. WALDRON, LIMITED,

Appellants,

versus

E. I. DuPONT de NEMOURS & COMPANY,

Appellee.

Appeals from the United States District Court for the Northern District of Mississippi.

(ORIGINAL RECORD RECEIVED JUN. 4/56.)

U. S. COURT OF APPEALS
FILED
JAN 25 1957
JOHN A. FEEHAN, Jr.
CLERK

[P. 504 to Pl. 16]

10

Cattle

1946

July	11			J-1	350000				
Sept	16			J-5	40000				
	19			J-6	625000				
1947						1947			
Jul	28			C77	15000	Dec 31 1969	J17	300000	
May	31			C33	25000	Dec 31 1950	J19	30000	
Sept	30			C41	302200	Sept 30 1957	J30	30000	
Dec	31			C63	27500	Dec 31 1952	J37	21000	
						June 1	J40	21000	
1948						Dec 31	J41	96700	
Apr	30			C51	100000	" 31	J44	20000	
June	30			C59	112500	" 31	J41	17483	
1949									
Jan	31	Calf Breeder		C73	6500				
Dec	31			J24	670000				
1950									
Feb	28			C94	100000				
Mar	31			C101	1650				
Apr	30			C103	320000				
Dec	31			C115	56000				
Nov	30			C117	440000				
Dec	31			C119	400000				
1951									
Jan	31			C21	21600				

Of Hans Jacobsen for Hilo Dairy Co

O.K. for Fred L. Wilson

C. Nils Tavares

Machine was evidence Exhibit #1 - Hilo Exhibit #1 in 1954

Jack Schaefer
Reporter

GENERAL LEDGER

ACCOUNT Cattle

ACCOUNT NO. 61

SHEET NO.

STANDARD FORM C16 PRINTED IN U.S.A.

CHARLES R. HADLEY CO. PATHFINDERS LOS ANGELES, SAN FRANCISCO, NEW YORK, CHICAGO

REG. U.S. PAT. OFF. STANDARD GENERAL LEDGER

DATE 19 53	DESCRIPTION	POSTING REF.	CHARGES	✓	CREDITS	✓	DR. OR CR.	BALANCE	✓
Jan 1	Balance						Dr	7521	60
Mar 31	Maidas Mill Farm	C-16	3750	00					
June 30	Maidas Mill Farm	C19	600	00				11871	60
Dec 31		J-4			2000	00		9871	60

STANDARD FORM C16

Marked as exhibit for identification
Plff's Exhibit #2—
6/9/54
Edith Montalvo
Reporter

SUMMARY OF COWS

PURCHASED SINCE OPENING BUSINESS

JULY 1, 1946

Date Purchased:	Cost:	Total Heads:	Remainder Feb. 1952:
1946	$ 10,150.00	49	17
1947	3,697.00	33	5
1948	2,125.00	14	2
1949	6,745.00	21	20
1950	13,170.50	49	36
	$ 35,887.50	166	80

Purchased Milk Cows:	80
Raised Heifers	21
Total Milk Cows 2/52	101
M/Cows death	51
M/Cows remainder	50
Death Milk Cows	51
	~~45~~
Heifers	6
Total M/cows & Heifers:	51

Mehida ass'n Pltf's exhibit
also Pltf's Exhibit - 6/10/54 (D-3)

Pltf's Exhibit 3 - Identification 2-sheets
6/9/54:

CATTLE PURCHASED

1946 - 1950

Year Purchased:	Cost:	Quantity:	Firms:
1946	$ 3,500.00	22	Kilauea Plantation Co.
	400.00	2	James Nishida
	6,250.00	25	Herbert Campos
	10,150.00	49	
1947	50.00	1	James Nishida
	250.00	1	Ishizaki
	3,022.00	29	Kilauea Plantation Co.
	275.00	2	Aguiar & Son
	3,697.00	33	
1948	1,000.00		
	1,125.00	14	Koloa Plantation Co.
	2,125.00	14	
1949	45.00	1	University of Hawaii
	6,700.00	20	Herbert Campos
	6,745.00	21	
1950	1,000.00	4	Wm. Hyde Rice
	3,200.00	21	Wm. Hyde Rice
	560.00	4	Joe Souza
	4,400.00	10	M. Costa Jr.
	4,000.00	10	Flechers
	13,170.50	49	
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also Pltf's Exhibit D-3 6/10/54 Bkg
Def's Ex #3, Photograph 2 sheets (D)

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Dfts Ex. 3
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509

U. S. District Court: Northern Dist. of Miss.

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Exhibit No. _____

Witness _____

Date _____ Plntf _____

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Official Reporter

510

L. L. FORD
ENTERPRISE, ALABAMA

LYMAN REED
CARUTHERSVILLE, MISSOURI

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L. L. FORD ASSOCIATES

ENGINEERS AND BUILDERS OF
SOLVENT EXTRACTION EQUIPMENT

Caruthersville,
October 11,1949

Mr.F.G.Low,
DuPont,
Wilmington.

Dear Mr.Low:

Mr.Ford and I visited Mr.Roach at Plainfield last week for a final check on Trichlorethylene. All previous information was favorable. We decided, after the visit to Roach, to burn our bridges and proceed.

Mr.Roach told us that, according to your reports to him, Tri residue in oil was about 35 parts in a million. We are now quoting that report and hope it is not wrong. If it is correct, there remains no basis for complaint against Trichlorethylene.

We are starting up the new mill at Belzoni, Mississippi, this week. Initially we shall use Hexane but later plan tointroduce Tri t o prove our point that in all departments Tri equals or betters Hexane until the point of safety arrives, and then there is no comparison. Of course, you probably know that the safety factor has about become factor number one. Another Hexane mill blew in Columbus, Ohio a few weeks ago.

I wish you would give us what information you have on Tri. We are sticking our necks out and we need help. Everywhere we run into suppositions, hearsay, guesses. Nothing ever factual. So now it is time for all hands to stand up and be counted we think. We are going to round up all facts available and go ahead, and damn the torpedoes. If Mr.Roach's solvent loss is less than half of one percent and residue under fifty parts in a million, we can certainly do it with ease. Mr.Ford believes he can make the thing foolproof, and I do too. It is done in the stripping column and is not too difficult.

Please tell us what we can shoot at and how we can determine just exactly what the residues are.

Cordially,
Lyman Reed

R-mp

Date 11-28-65 Exhibit No. L-47
Cov't. ( )
Pl. ( ) Witness Ford (Cross)
Def. ( )
Ivy McKinnie
Reporter

If G. - Dept
Creosote - Lumber Dept
GGL

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Chemical Safety Data Sheet SD-14

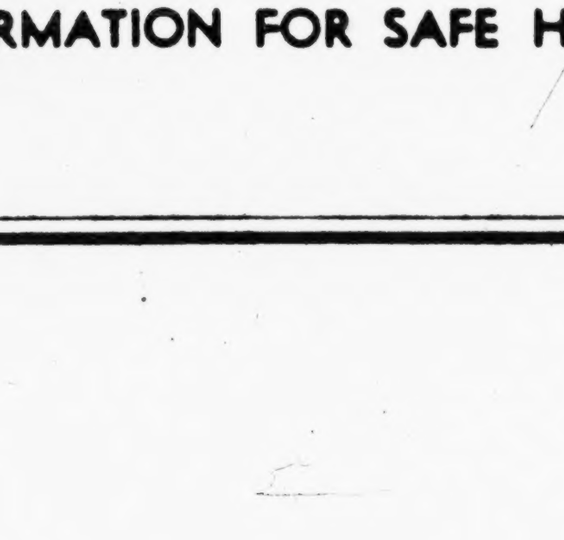
ADOPTED 1947

TRICHLOROETHYLENE

●

PROPERTIES

ESSENTIAL INFORMATION FOR SAFE HANDLING AND USE



Manufacturing Chemists' Association of the United States
608 Woodward Building, Washington 5, D. C.

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Manual Sheet SD-14

Chemical Safety Data Sheet

TRICHLOROETHYLENE

Adopted July, 1947

1. NAME

Chemical Name: Trichloroethylene
Common Names: Trichlorethylene, Ethylene Trichloride
Formula: $ClHC:CCl_2$

2. PROPERTIES

2.1 **Grades.** Technical or Dry Cleaning, Degreasing, and Extraction.

2.2 **Important Physical and Chemical Properties**

Color: Clear, colorless liquid, unless marked with an identifying dye, e.g., Degreasing grade.
Odor: Somewhat similar to odor of chloroform.
Vapor Density (Air = 1): 4.54
Boiling Point (760 mm): 86.9°C (188°F)
Melting Point: −86.4°C (−124°F)
Explosive Limits: Not flammable or explosive at ordinary room temperatures but moderately flammable at higher temperatures.
Ignition Temperature: 410°C (770°F)
Corrosive: Suitably stabilized trichloroethylene may be used in the presence of air, water and light with any of the common construction metals at temperatures up to 120°C (248°F).
Dangerously Reactive: No, except that strong alkalies, such as caustic soda, may react with trichloroethylene to form explosive mixtures (dichloracetylene). Weaker alkalies, such as trisodium phosphate, may be used with safety.
Hygroscopic: No.
Light Sensitive: See "Corrosive" above.
Specific Gravity at 20° 4°C (68° 39°F) (Water = 1): 1.464

VAPOR PRESSURE

Temperature °C	Temperature °F	Vapor Pressure mm Mercury
0	32	19.9
10	50	35.7
20	68	57.8
30.5	87	93.7
40	104	146.8
50	122	212
60	140	305.7
86.9	188	760

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2.3 **Hazardous Properties**

2.3.1 *HEALTH HAZARDS.* (See 8. Health Hazards and Their Control.) Trichloroethylene is toxic by inhalation, by prolonged or repeated contact with the skin or mucous membrane, or when taken by mouth.

2.3.2 *FIRE HAZARD* (See 6.2 Fire and Explosion Hazards)

2.3.2.1 The fire hazard is very small. Trichloroethylene is classed as non-flammable at ordinary temperatures, and moderately flammable at higher temperatures.

2.3.2.2 Trichloroethylene vapor exposed to high temperatures, such as occur in open flames and open electric heaters, may be decomposed to toxic and corrosive substances. (See 6.2.3)

3. USUAL SHIPPING CONTAINERS

Trichloroethylene is not regulated by the Interstate Commerce Commission.

3.1 **Type and Size**

Tank cars.

Metal drums, ICC Spec. 17E, 55 gallon maximum.

Metal drums, Consolidated Freight Classification, Rule 40, Section 5C.

3.2 **Label or Identification**

3.2.1 Each container (including tank cars) should carry an identifying label or stencil.

3.2.2 The caution label to be placed on each container under the agreement between the United States Public Health Service and the producers is given below.

3.2.3 In addition to the caution label, the label on each container should bear any label warnings required by statutes, regulations or ordinances.

3.3 **Disposal and Return Precautions**

3.3.1 *TANK CARS.* Return empty tank cars as promptly as possible in accordance with instructions received from the shipper. Shipper's routing instructions should always be followed strictly.

3.3.2 *DRUMS.* Before returning shipping containers to suppliers, observe usual precautions regarding complete drainage of contents and properly close all openings.

4. UNLOADING AND EMPTYING

4.1 **Health Hazards.** (See 8. Health Hazards and Their Control). Trichloroethylene is toxic by inhalation, by prolonged or repeated contact with the skin or mucous membrane, or when taken by mouth.

4.2 **Fire Hazard.** The fire hazard is small. (See 6.2 Fire and Explosion Hazards.)

4.3 **Tank Cars**

4.3.1 Unloading operations should be conducted by carefully instructed, reliable employees under adequate supervision, (see 6.4).

TRICHLOROETHYLENE

WARNING! VOLATILE SOLVENT

Use with adequate ventilation.

Avoid prolonged or repeated breathing of vapor.

Avoid prolonged or repeated contact with skin.

Do not take internally.

4.3.2 See that the car is spotted accurately and track is level.

4.3.3 Derails should be placed at one or both ends of the unloading track approximately one car-length from the car being unloaded, unless the car is protected by a closed and locked switch or gate.

4.3.4 The hand-brake should be set and standard rail clamps should be installed to block the wheels at the time of unloading. Metal "caution" signs should be fastened to the track. Signs should be 12" x 15", painted light blue. Use the legend "STOP TANK CAR CONNECTED", with the letters in "STOP" four inches high. Signs are available from safety equipment dealers.

4.3.5 If the unloading track is provided with an electric trolley wire, the current should be turned off before unloading is started.

4.3.6 Shipper's instructions for unloading should always be followed, and all caution markings on both sides of tank or dome should be read and observed.

4.3.7 In the event of a leak in the tank car or the fittings that cannot be stopped by following the previous instructions from the supplier or by simple adjustment or tightening, immediately telephone or wire the supplier for further instructions.

4.4 Drums

4.4.1 Drums should be unloaded carefully to prevent damage. Do not drop or bump.

4.4.2 Each shipment should be examined carefully for leaking drums. If any are found, they should be handled with particular care by turning leak up to prevent further leakage, and should be removed to a safe place where the leakage can be stopped by tightening the plug or by some other approved method.

4.4.3 Before emptying contents, substantially support the drums and block them to prevent movement.

4.4.4 A satisfactory method of removing trichloroethylene from drums is by means of a rotary pump. If emptied by gravity, the drum should be placed on a rack and a faucet inserted in the end bung. Faucets should have short shanks threaded with Briggs standard straight iron pipe threads. A resilient gasket of suitable material should be used to insure a tight fit. Bung opening and faucet must have the same type and number of threads per inch (M.C.A. Manual Sheet D-32). Protect workmen from vapor and liquid. (See 8.3 Personal Protective Equipment.)

4.4.5 To remove the body plug, place bung up, and use a bung or plug wrench. Stand to one side and face away during the operation. After plug starts, give one full turn. If accumulated internal pressure vents, allow it to reduce to atmospheric pressure; then only should the plug be loosened further or removed.

5. STORAGE

5.1 Hazards.

5.1.1 *HEALTH HAZARDS.* (See 8. Health Hazards and Their Control). Trichloroethylene is toxic by inhalation, by prolonged or repeated contact with the skin or mucous membrane, or when taken by mouth.

5.1.2 *FIRE HAZARD.* The fire hazard is small. (See 6.2 Fire and Explosion Hazards.)

5.1.3 *CORROSION.* Under normal conditions, trichloroethylene may be stored satisfactorily in galvanized iron, black iron or steel equipment. (See 2.2 Important Physical and Chemical Properties.)

5.1.4 *VOLATILITY.* Trichloroethylene is more volatile than water. (See 2.2 Important Physical and Chemical Properties.)

5.2 Conditions of Storage

5.2.1 Each tank, either vertical or horizontal, should have a top and bottom manhole at least 22 inches in diameter, in addition to filling, vent, and measuring device openings, which should be 2 inch flanged connections in the top of the tank. A 2 inch or $2\frac{1}{2}$ inch bottom outlet should be provided for use as a drain during clean-out operations. Vertical tanks should be of the closed top design, and the top should be caulked or welded vapor-tight.

5.2.2 Each storage tank should have a vent large enough (usually 2 inch) to permit the escape of vapor during filling. Vents from indoor tanks should terminate outdoors, in such a location that escaping vapor will not contaminate any work space air. The vent is usually protected against entry of moist air by being extended down over the side of the tank into a chamber filled with lump calcium chloride for removal of moisture in the air. It is recommended that a tee be provided in this line above the dryer so that a mercury seal $\frac{1}{2}$ inch deep

can be installed as a safety vent in case the dryer plugs from excess moisture. Do not allow mercury to be spilled in any work space. Avoid open mercury surfaces in work spaces.

5.2.3 The storage tank should be grounded adequately to discharge the static electricity which builds up from pumping any dry liquid. (See NFPA pamphlet "Static Electricity").

5.2.4 Drums of trichloroethylene should be stored in a cool place, bung up. To prevent evaporation losses, bungs should be kept tight at all times.

5.2.5 Ventilation should be provided at the floor level, as well as in the usual higher locations. Note that vapor is 4.54 times heavier than air. (See 2.2.) Do not store in pits, depressions, basements, or unventilated areas.

6. HANDLING

6.1 **Health Hazards.** (See 8. Health Hazards and Their Control). Trichloroethylene is toxic by inhalation, by prolonged or repeated contact with the skin or mucous membrane, or when taken by mouth.

6.2 Fire and Explosion Hazards

6.2.1 The fire hazard is very small. Trichloroethylene is classed as non-flammable at ordinary temperatures, and moderately flammable at higher temperatures.

6.2.2 Trichloroethylene is not flammable or explosive at ordinary room temperatures but is moderately flammable at higher temperatures (32°C; 90°F, and upward) under conditions in which the concentration of vapor in air is comparatively high (about 15 per cent by volume) and there is an intense source of ignition such as an electric arc. A higher temperature (about 50°C; 122°F, and upward, depending upon conditions) is required to produce moderately flammable vapor-air mixtures which can be ignited by a less intense source of ignition such as ordinary sparks and flames.

6.2.3 In the presence of an excess of water, or at very high temperatures, such as occur in open flames, trichloroethylene may decompose to give hydrochloric acid and other products.

6.3 Spills and Leakage

6.3.1 Spills should be cleaned up immediately. Employees performing this work should wear adequate personal protective equipment. (See 8.3 Personal Protective Equipment.)

6.3.2 Rags or mops wet with trichloroethylene should be placed in closed containers or in a safe place out of doors until they can be dried safely.

6.3.3 Clothing wet with trichloroethylene should be removed immediately. The clothing should not be used again until dry and free of the odor of trichloroethylene. Dry clothing out of doors or in a properly ventilated area.

6.4 Employee Education and Training (See 8.2.3)

6.4.1 Safety in handling trichloroethylene (and other hazardous or corrosive chemical products) depends upon the effectiveness of employee education, training and supervision.

6.4.2 The education and training of the employees to work safely and to use the personal protective equipment or other safeguards provided for them is a responsibility of supervision.

6.4.3 Employee education and training should emphasize the need of handling trichloroethylene according to the methods outlined in this manual.

6.4.4 Before being placed on the job, new employees should be instructed thoroughly in the proper handling of trichloroethylene. Older employees should be reinstructed periodically. Each employee should be instructed not to use trichloroethylene for personal cleaning purposes.

6.4.5 Each employee should know the location, purpose, and maintenance of personal protective equipment and be thoroughly trained when and how to use it (see 8.3).

6.4.6 Each employee should know the location of safety showers, bubbler drinking fountains for flushing the eyes, and hose lines.

6.4.7 Only reliable, dependable, and properly trained employees should be given the responsibility of operating valves which control the movement of trichloroethylene to and from storage tanks, tank cars, and containers.

6.4.8 Employees should be trained to report to the proper authority all suspected leaks or equipment failures, and any signs of illness or skin difficulties.

6.4.9 Each employee should know what to do in an emergency (see 6.3) and in first aid measures (see 8.4), and should realize the necessity for the prompt application of first aid

in case of contact with trichloroethylene or exposure to the vapor.

6.5 **Personal Protective Equipment.** Equipment for the protection of individuals handling trichloroethylene is described in 8.3 Personal Protective Equipment.

6.6 **Engineering Controls**

6.6.1 *LOCATION OF PROCESS.* Processes should not be located near open flames, open electric heaters or high temperature operations, since trichloroethylene vapor exposed to such high temperatures may be decomposed to toxic and corrosive substances. (See 2.3.2.2.)

6.6.2 *DESIGN OF EQUIPMENT.* Processes should be designed so that the operator is not exposed to direct contact with trichloroethylene or its vapor. The technical problems of designing equipment, providing adequate ventilation and formulating operational procedures which promise maximum security and economy, can be handled best by engineers and safety experts. The manufacturers of trichloroethylene, and of the equipment in which it is to be used, are always prepared to help with these problems, and to assist in maintaining safe working conditions. In most States, authoritative advice and assistance may also be obtained from the industrial hygiene division of the State health department, or from the labor department.

6.6.3 *SYSTEM TYPES.* Depending upon the application, trichloroethylene may be used in any one of the three systems described below. Any one of the three system types may be adapted to some other various applications of trichloroethylene.

6.6.3.1 For the vapor degreasing of metals, equipment manufacturers have designed special open type machines in which the solvent liquid and vapor are controlled by balanced heat input and cooling capacity. Where vapor degreasing units are installed in locations free from draft conditions and used to clean free draining material, an exhaust is not ordinarily required. However, where either the location or the nature of the work handled leads to more than normal diffusion losses or to a substantial dragout, an exhaust system should be installed.

6.6.3.2 Partially closed equipment has been designed for the use of trichloroethylene in the dry cleaning industry. Such equipment, however, exhausts the greater part of the solvent vapor to the outside atmosphere, thereby minimizing exposure of the worker. Proper design of the machine insures against seepage of solvent liquid and vapor during the cleaning operation. Partially closed systems are likewise adapted to metal degreasing operations in some conveyorized vapor units.

6.6.3.3 Extraction equipment designed for trichloroethylene is an example of a closed system design.

6.6.4 *VAPOR MEASUREMENTS*

6.6.4.1 When checking concentrations of trichloroethylene vapor in the atmosphere, care is required to make certain that the sample is representative of the air breathed by the workers, and of the daily fluctuations which may occur.

6.6.4.2 Continuous recording instruments, arranged to give audible and visible signals when a predetermined concentration of trichloroethylene vapor in air is reached, are available.

6.6.4.3 Testing methods are described in the following references:

Flame Test Method, Using the Halide Torch:
V. A. Stenger et al., Ind. Eng. Chem., Anal. Ed., *11*:121 (1939)
F. H. Goldman, J. Ind. Hyg. & Toxicol., *25*:181 (1943)

Thermal Decomposition Method:
J. C. Olsen et al., Ind. Eng. Chem., Anal. Ed., *8*:260 (1936)
H. F. Smyth, Ind. Eng. Chem., Anal. Ed., *8*:379 (1936)
H. Elkins et al., J. Ind. Hyg. & Toxicol., *19*:474 (1937)
B. D. Tebbens, J. Ind. Hyg. & Toxicol., *19*:204 (1937)
W. F. von Oettingen, J. Ind. Hyg. & Toxicol., *19*:413 (1937)

Vapor Pressure Method:
C. Couchman et al., J. Ind. Hyg. & Toxicol., *21*:256 (1939)
K. Kay et al., J. Ind. Hyg. & Toxicol., *21*:264 (1939)
L. Silverman et al., J. Ind. Hyg. & Toxicol., *21*:270 (1939)

Gas Interferometer Method:
F. A. Patty, J. Ind. Hyg. & Toxicol., *21*:469 (1939)
G. Harrold et al., J. Ind. Hyg. & Toxicol., *21*:491 (1939)

Adsorption Method:
W. Cook et al., J. Ind Hyg. & Toxicol., *18*:194 (1936)
L. Cralley et al., J. Ind. Hyg. & Toxicol., *25*:172 (1943)

Photometric Method:
V. F. Hanson, Ind. Eng. Chem., Anal. Ed., *13*:119 (1941)

Colorimetric Method:
H. M. Barrett, J. Ind. Hyg. & Toxicol., *18*:341 (1936)

See also American Standards Association, "Allowable Concentration of Trichloroethylene", Approved Aug. 6, 1946, Z37.19—1946. (200 ppm).

6.7 Ventilation

6.7.1 General ventilation should be adequate for processes conducted in closed or partially closed equipment, but mechanical exhaust ventilation, preferably of the downdraft type, may be provided for clean-out and other special operations. Open top vapor degreasers, however, should be provided with suitable baffles and otherwise protected from drafts to avoid entrainment of trichloroethylene vapors. Where equipment is located in pits or depressions, separate mechanical exhaust ventilation should be installed at the lowest level.

6.7.2 Intakes to exhaust ventilating systems should be as close as possible to the point where the vapor escapes or to the source of contamination and designed to draw the vapor away from the operator but not across his face.

6.8 Tank and Equipment Cleaning and Repairs

6.8.1 The hazardous nature of tank and equipment inspection, cleaning, or repairs requires that the foreman and crew be selected, trained, and drilled carefully. They should be fully familiar with the hazards, and the safeguards necessary for the safe performance of the work.

6.8.2 Wherever possible, enclosures should be cleaned from the outside, using clean-out doors.

6.8.3 All pipe lines into or out of the tank or other apparatus should be disconnected, preferably by removing a complete small section and providing a blank flange on the open end to protect against human error and unsuspected leaks. Valves, cocks, and blank flanges in the pipe line should not be relied upon.

6.8.4 Danger signs should be placed suitably to indicate when workmen are in the tank or other apparatus.

6.8.5 Be sure the tank can be left by the original entrance.

6.8.6 Lock all electrical switches in the off position, remove belts, disconnect agitators and completely safeguard against accidental starting of any agitating equipment or other moving parts located inside or adjacent to the tank entrance.

6.8.7 Before entering a tank and during the course of the work, tests should be made by a qualified person to determine if further washing is necessary; to make sure that no oxygen deficiency exists and that no harmful gases are present. Before directing men to enter a tank, an inspection of the interior should be made by the foreman who should be equipped with a hose-type gas mask, life belt, and life line; another person should be on guard during the inspection.

6.8.8 Proper personal protective equipment should be worn by anyone entering a tank for inspection, cleaning, or repairs (see 8.3).

6.8.9 One man on the outside of the tank should keep the men in the tank under constant observation, and at least two men should be available to aid in rescue if any of those in the tank are overcome.

6.8.10 A supplied air respirator or self-contained breathing apparatus, together with rescue harness and life line, should always be located outside the tank entrance for rescue purposes, regardless of the type of respiratory equipment or air supply which is provided for employees inside the tank.

6.8.11 In addition to protecting the workmen actually engaged in cleaning and repairing the tank, attention should be paid to the protection of workers in nearby areas.

6.8.12 Cleaning or making repairs inside a tank may be hazardous even though the tank contained a non-toxic, non-flammable material. In addition to the precautions generally recommended for tank work, such as procurement of written approval of supervision, testing for oxygen deficiency, use of rescue harness or life belt and life line, provision of grounded equipment in good condition for portable electric lights and power tools, and stationing of thoroughly trained "watchers" outside of the tank entrance, important additional precautions are recommended as follows:

(a) Before entering the tank, it should be emptied, dried and cleared of trichloroethylene vapor.

(b) Since trichloroethylene vapor is 4.54 times heavier than air, the tank may be ventilated through openings at the bottom, or by mechanical exhaust with in-

take at the lowest part of the enclosure.

(c) Ventilation should be continued during cleaning, repairing, or inspection.

6.9 Repackaging and Blending

6.9.1 Repackaging should be done with adequate attention to the health hazards involved. (See 8. Health Hazards and Their Control.)

6.9.2 A label on small containers may be required by State statutes, regulations, or ordinances. (See 3.2 Label or Identification.)

6.9.3 Trichloroethylene may be added to flammable solvents to form less flammable or relatively non-flammable mixtures. It should be noted, however, if the flammable solvent is less volatile than trichloroethylene, the mixture will tend to become more and more flammable on evaporation. If the flammable portion is more volatile than trichloroethylene, the vapor may be highly flammable although the liquid mixture is non-flammable.

6.9.4 When trichloroethylene is added to other solvents, the health hazards of the various constituents of the mixture must be given careful consideration.

6.9.5 The addition of other products to trichloroethylene may affect its corrosive properties.

7. WASTE DISPOSAL

7.1 Residue may be poured on dry sand, earth, or ashes at a safe distance from occupied areas and allowed to evaporate into the atmosphere.

8. HEALTH HAZARDS AND THEIR CONTROL

This section includes not only recognized first aid procedures and information of interest to the layman, but also suggestions which may be of value to the attending physician.

8.1 Hazards

8.1.1 Trichloroethylene is toxic by inhalation, by contact with skin or mucous membranes or by oral intake. Prolonged, excessive, or repeated exposures to the product in any form are hazardous.

8.1.2 The signs and symptoms of trichloroethylene poisoning are the result of injury to the nervous system, lungs, skin and digestive system. In contrast to chloroform and carbon tetrachloride, injuries to the liver and kidneys are rare. The clinical picture varies with the type of exposure and the amount of the chemical product which is absorbed either at one time or at repeated times.

8.1.3 Symptoms of excessive exposure include: loss of appetite, sleeplessness, shortness of breath, cough, vomiting, pains in the abdomen, and jaundice. In a few cases delirium, disturbances of vision, or convulsions may be noted.

8.1.4 *TOXIC EFFECTS AFTER INHALATION.* The generally accepted maximum allowable concentration in air is 200 ppm by volume for an 8-hour day. When exposed to higher concentrations of vapor, workers usually complain of tears and burning of the eyes and irritation of the nose and throat. There may also be nausea, vomiting, drowsiness, an attitude of irresponsibility and even an appearance resembling that of alcoholic intoxication. Like other chlorinated hydrocarbons, trichloroethylene acts as an anesthetic. (See 6.2.3)

8.1.4.1 *Acute Poisoning*

8.1.4.1.1 When the worker inhales an excessive amount of vapor within a short period of time, acute poisoning may occur. The first reaction is irritation of eyes, nose and throat, fullness in the head with mental confusion. There may be dizziness, stupefaction, nausea, and vomiting. High concentrations of trichloroethylene prevent the proper utilization by the tissues of the oxygen in the blood. When this condition is present, physical activity may lead to severe or even fatal circulatory failure. If the workman is not immediately removed from the vapor he may become unconscious and serious injury can occur.

8.1.4.1.2 Some conditions under which acute poisoning may occur are as follows:

(a) By accident, such as equipment failure,

(b) When workers enter enclosures or tanks without having taken adequate precautions (see 6.3),

(c) When trichloroethylene is handled carelessly (see 6.4).

8.1.4.2 *Subacute Poisoning*

8.1.4.2.1 Subacute trichloroethylene poisoning may result from prolonged or re-

peated work in an atmosphere containing high concentrations of trichloroethylene, but under conditions in which the amount absorbed is not sufficient to cause loss of consciousness.

8.1.4.2.2 Workers with subacute poisoning may become acutely ill and suffer from headache, fatigue, nausea, vomiting, mental confusion and visual disturbances. There may be nerve paralysis affecting such structures as the nerves to the face or extremities. Sometimes there is delirium. In some cases after repeated exposure a craving seems to develop so that the subject seeks further exposure and becomes an "addict". In other cases there seems to be a definite action on the nerve supply to the heart causing a condition known as fibrillation. There is reason to believe that, in some cases at least, this has resulted fatally.

8.1.4.2.3 Some conditions under which subacute poisoning may occur in employees are as follows:

(a) Where the ventilation is inadequate, resulting in high concentrations of trichloroethylene,

(b) Where the vapor concentrations are high intermittently, due to faulty handling of the liquid,

(c) Failure of the individual to observe precautionary measures,

(d) When an acute exposure of high concentrations is superimposed upon the prolonged exposure to mild concentrations, circulatory failure can occur.

8.1.5 *TOXIC EFFECTS FROM EXTERNAL CONTACT*

8.1.5.1 *Skin.* Trichloroethylene may cause dermatitis after repeated or prolonged contact with the skin, as occurs in prolonged or repeated handling of rags wet with the chemical product, dipping hands into the liquid, and wearing clothing saturated with it. Reddening, burning and, rarely, blisters may follow such exposure. In certain rare cases, the dermatitis may be caused by hypersensitivity to trichloroethylene. The skin becomes rough, red and dry due to the removal of skin oils. It cracks easily and is readily susceptible to infection. The skin has a chapped appearance.

8.1.5.2 *Eyes.* Trichloroethylene may enter the eyes either as a vapor or a liquid (spray or splash). The resultant irritation produces lacrimation, burning and other symptoms of inflammation. It can cause serious eye damage.

8.1.6 *TOXIC EFFECTS AFTER ORAL INTAKE.* The initial symptoms after toxic amounts of trichloroethylene are taken by mouth are those of irritation of the gastrointestinal tract, such as nausea, vomiting, diarrhea with bloody stools. The patient may become rapidly drowsy and later unconscious accompanied by a stopping of kidney functions. These may be followed by the general symptoms of poisoning enumerated above.

8.2 Prevention and Control

8.2.1 *VENTILATION*

8.2.1.1 The most important factor in prevention of toxic effects is to have sufficient ventilation to keep the concentration of vapor in the air below 200 ppm. The odor of trichloroethylene is distinct and noticeable even in relatively safe concentrations.

8.2.2 *STORAGE AND LABELING.* Containers should be labeled properly and closed tightly to minimize the danger of evaporation and spillage.

8.2.3 *EMPLOYEE EDUCATION* (See 6.4 Employee Education and Training)

8.2.3.1 Employees should be instructed to report any signs or symptoms of a substandard physical condition and receive medical attention.

8.2.3.2 Those working regularly with trichloroethylene may well be provided with a folder explaining the dangerous properties of this material and a statement of proper precautions to observe.

8.2.4 *PREPLACEMENT PHYSICAL EXAMINATIONS*

Certain individuals have been found who are unduly susceptible to various chlorinated hydrocarbons, as shown by previous experiences. The exposure of such individuals can be minimized by a careful preplacement physical examination. Exposures to trichloroethylene even in concentrations known to be non-hazardous to normal individuals should be prohibited in the following cases:

(a) Alcoholics,

(b) Exceedingly fleshy individuals,

(c) Undernourished individuals,

(d) Those with pulmonary diseases, stomach ulcers, high blood pressure, diseases of the liver, kidney, or heart, and

(e) Those suffering from paralysis, convulsive seizures and highly nervous states.

8.2.5 *PERIODIC PHYSICAL EXAMINATIONS.* Employees who are exposed regularly to trichloroethylene should be examined, at least semiannually, by a physician acquainted with the occupational hazards involved. Physical examinations should be required also when any symptoms of poisoning such as enumerated above are present in employees. Discovery of symptoms of trichloroethylene poisoning may indicate some defect in operation. This would serve as an indication to examine other exposed employees for early signs of poisoning.

8.3 Personal Protective Equipment

8.3.1 Personal equipment should not be used as a substitute for good, safe, working conditions nor for adequate ventilation. Such equipment may protect the individual wearing it while others in the room may be exposed to high concentrations of vapor. Equipment requires regular inspection, cleaning and replacement. This is especially true of industrial gas masks, since the canister contents become exhausted. The correct use of personal protective equipment requires education of the worker and careful supervision whenever such equipment is utilized. (See 6.4 Employee Education and Training.)

8.3.2 Employees who may be subjected to severe exposures of trichloroethylene vapor as in tank cleaning and repairs (see 6.8), in intermittent operations where general ventilation is not practical, in cases of failure of piping or equipment, and in cleaning up spills, should be provided when indicated with proper eye and respiratory protection as follows:

(a) Suitable gas-tight chemical safety goggles,

(b) Rescue harness and life line for those entering a tank or enclosed storage space. An outside attendant should maintain constant observation (see 6.8 Tank and Equipment Cleaning and Repairs),

(c) Hose masks with hose inlet in vapor-free atmosphere, or

Air-line masks with proper reducing valve and filter suitable for use where conditions will permit safe escape in case of failure of the compressed air supply, or

Self-contained breathing equipment with stored oxygen or air, which allows greater mobility but requires highly trained men.

(d) Industrial gas masks, approved by the United States Bureau of Mines with canisters approved for use in trichloroethylene vapor, should be used only when it is certain that the concentration of vapor is less than 2 per cent (20,000 ppm) and there is no atmospheric oxygen deficiency, and then only for exposures not exceeding one-half hour.

8.3.3 To prevent dermatitis or other effects of direct contact with trichloroethylene with the skin, employees should be provided with:

(a) Gloves and aprons fabricated from, or impregnated with, polyvinyl alcohol plastics or neoprene,

(b) Acid-type goggles where there is danger of splashing.

CAUTION: *Protective creams can not be relied upon to afford adequate protection.*

8.3.4 Facilities for personal cleanliness should be provided and time allowed for thorough washing before lunch and at the end of the work day.

8.3.5 Careful cleansing with mild soap, followed by the use of an oily cream containing lanolin to replace skin oils which may have been dissolved by trichloroethylene, is an important aid in preventing dermatitis.

8.3.6 Reliable safety equipment manufacturers can supply appropriate protective equipment if they are informed accurately of the particular product in use.

8.4 First Aid and Medical Treatment

8.4.1 *GENERAL PRINCIPLES*

8.4.1.1 Most important in the case of any poisoning is quick removal from exposure. In the case of trichloroethylene poisoning, this means first removing the patient from the contaminated atmosphere and, insofar as possible, removing the trichloroethylene from the patient's respiratory tract, skin, or gastro-intestinal tract.

8.4.1.2 Give the patient fresh air by moving him to a well ventilated room and by dispersing any crowd. If breathing has ceased, start artificial respiration at once.

PHYSICAL PROPERTIES
of
DU PONT CHLORINATED HYDROCARBONS

—	Methylene Chloride	Chloroform	Trichlor-ethylene	Perchlor-ethylene
Chemical Formula	CH_2Cl_2	$CHCl_3$	$CHCl{=}CCl_2$	$CCl_2{=}CCl_2$
Molecular Weight	84.94	119.39	131.40	165.85
Boiling Point (760 mm.) °C.	39.8	61.2	86.9	121.2
°F.	103.6	142.2	188.4	250.2
Freezing Point °C.	−96.7	−63.5	−86.4	−22.35
°F.	−142.1	−82.3	−123.5	−8.2
Steam Distn. Point (1 atm.) °C.	38.3	56.0	73.2	87.7
°F.	100.9	132.8	163.8	189.9
Solvent: Water Ratio, by wt.	66.3:1	34.1:1	13.4:1	5.32:1
Latent Heat of Vaporization (B.P.) C.H.U. = cal./g.	78.7	59.3	57.2	50.0
B.T.U./lb.	141.7	106.7	103.0	90.0
Specific Heat Liquid (20°C.)	0.276	0.234	0.225	0.205
Vapor (Cp) (1 atm.) cal./g./°C. or B.T.U./lb./°F.	0.155	0.142	0.156	0.146
	40°C.	61.2°C.	80°C.	100°C.
Critical Temperature °C.	245.0	262.9	271.0	347.1
°F.	473.0	505.2	519.8	656.8
Critical Pressure, atm.	60.9	53.8	49.5	—
Thermal Conductivity Liquid (20°C.)	0.0920	0.0751	0.0801	0.0732
Vapor (B.P.) B.T.U./hr. (sq. ft.) (°F./ft.)	0.00438	0.00455	0.00482	0.00505
Specific Gravity (20°/4°C.)	1.326	1.489	1.464	1.623
Pounds per Gal. (20°C.)	11.07	12.43	12.30 (15°C.)	13.55
Coefficient of Cubical Expansion —Av./°C. Liquid	0.00137	0.00129	0.00117	0.00102
	0°–40°C.	0°–40°C.	0°–40°C.	0°–25°C.
Vapor Density g./liter	3.30	4.36	4.45	5.22
(B.P., 760 mm.) lb./cu. ft.	0.206	0.272	0.278	0.326
Specific Gravity (Air = 1.00)	2.93	4.13	4.54	5.83
Diffusivity in Air (25°C., 1 atm.), sq. cm./sec.	0.091	0.079	0.073	0.067
Evaporation Rate (ether = 100)	71	56	28	9
Solubility in Water (25°C.), g./100 g.	1.32	0.79	0.11	0.015
Solubility of Water in Chlorohydrocarbon (25°C.), g. Water/100 g.	0.170	0.083	0.027	0.0105

8.4.1.3 Keep the patient quiet and comfortably warm but not hot.

8.4.1.4 Call a physician immediately, explaining briefly and clearly what has happened and the exact location of the patient. *Do not give anything by mouth to an unconscious patient.*

8.4.2 *SPECIFIC ACTIONS*

8.4.2.1 *Inhalation*

A person showing symptoms of trichloroethylene vapor poisoning should be removed promptly from the contaminated area. In case breathing has stopped, effective artificial respiration, such as that obtained by the prone pressure method, should be started immediately. If oxygen inhalation apparatus is available, oxygen should be administered only if one familiar with the operation of the apparatus is present to administer it. If patient is conscious, hot tea or coffee may be given as a stimulant.

Adrenalin should never be given to a person suffering from trichloroethylene poisoning. A physician should be called at once.

8.4.2.2 *Skin Contact.* All contaminated clothing should be removed at once. Clothing, including shoes, soaked in trichloroethylene should be removed and not worn again until thoroughly dry. All affected areas should be washed thoroughly with warm water and soap. After this an ointment containing lanolin should be applied in order to replace the natural skin oils. For serious or persistent cases of skin trouble and for signs and symptoms of generalized poisoning, a physician should be consulted.

8.4.2.3 *Contact with Eyes.* If liquid trichloroethylene has entered the eyes or if they have been exposed to strong concentrations of the vapor, they should be irrigated immediately and copiously with water for a minimum of 15 minutes. The eye lids should be held apart during the irrigation to insure contact of water with all the tissues of the surface of the eye and lids. A physician should be called in attendance at the first possible moment, preferably an eye specialist. If a physician is not immediately available, the eye irrigation should be continued for a second period of 15 minutes. After the first 15 minute period of irrigation is completed, it is permissible, as a first aid measure, to instill two or three drops of an 0.5 per cent pontocaine solution or an equally effective aqueous topical anesthetic. No oils or oily ointments should be instilled unless ordered by the physician.

8.4.2.4 *Taken Internally.* If a person has swallowed trichloroethylene, he should be made to vomit by drinking a glassful of mustard water, lukewarm salt water, or soapy warm water. If necessary, the patient should be encouraged to stick his finger down his throat to induce vomiting. This procedure should be repeated at least three times and then followed by the administration of a tablespoonful of epsom salts. A physician should be called at once.

The medical information in this publication has been supplied by the Medical Advisory Committee of the Manufacturing Chemists' Association.

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CHEMICAL SAFETY DATA SHEETS

Manual Sheet SD-1	Formaldehyde	15 cents
Manual Sheet SD-2	Benzene	25 cents
Manual Sheet SD-3	Carbon Tetrachloride	20 cents
Manual Sheet SD-4	Phenol	20 cents
Manual Sheet SD-5	Nitric Acid	30 cents
Manual Sheet SD-6	Paraformaldehyde	15 cents
Manual Sheet SD-7	Acetylene	15 cents
Manual Sheet SD-8	Anhydrous Ammonia	20 cents
Manual Sheet SD-9	Caustic Soda	20 cents
Manual Sheet SD-10	Caustic Potash	20 cents
Manual Sheet SD-11	Perchloric Acid Solution	20 cents
Manual Sheet SD-12	Carbon Disulfide	20 cents
Manual Sheet SD-13	Aqua Ammonia	20 cents
Manual Sheet SD-14	Trichloroethylene	20 cents

MANUALS OF STANDARD and RECOMMENDED PRACTICE

Manual L-1 Manual L-2	Warning Labels	1.00

The Chemical Safety Data Sheets, and a complete list of publications including manual sheets on unloading tank cars, drums, and carboys when filled with certain chemical products may be secured from the

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Guide No. 60 L1. December 18, 1946 File MH494.

du Pont de Nemours & Co., Inc., E. I., Mfr., Electrochemicals Dept., Wilmington 98, Del. Plants: Niagara Falls, N. Y.; Wyandotte, Mich.

Cleaning Liquid.

A volatile liquid consisting of trichlorethylene, metal degreasing grade; intended for use in cleaning metals. Not flammable or explosive at ordinary room temperatures but moderately flammable at higher ambient temperatures (32 C, 89.6 F and upward) under conditions in which the concentration of vapor in air is comparatively high (about 15 per cent by volume) and there is an intense source of ignition such as an electric arc. A higher ambient temperature (about 50 C, 122 F and upward, depending upon conditions) is required to produce moderately flammable vapor-air mixtures which can be ignited by a less intense source of ignition such as ordinary sparks and flames.

Classed as nonflammable at ordinary temperatures and moderately flammable at higher temperatures. The fire hazard is very small, being rated 3 as determined by Underwriters' Laboratories, Inc.'s Standard for Classification in which

Ether rates	100
Gasoline rates	90—100
Alcohol (ethyl) rates	60— 70
Kerosene (100 F flash) rates	30— 40
Paraffin oil rates	10— 20

Marking: Listee's name and "Triclene D."

Listed—Reexamination Service.

See description of Reexamination Service on guide card.

This card replaces MH494 dated Aug. 9, 1946.

This card is issued by Underwriters' Laboratories, Inc.

Ef 12-16- Dept
Cross Ref Ford
Y+

[22]

DU PONT

CHLORINATED

HYDROCARBONS

Nonflammable Fluids for Industrial

Exhibit "A"

526

[redacted]

THE INDUSTRIAL use of solvents has been greatly expanded through the development of synthetic organic materials with inherent properties which make them practicable and desirable for many products and processes. Among the important synthetic fluids are the nonflammable chlorinated hydrocarbons trichlorethylene, perchlorethylene, methylene chloride, and chloroform.

These solvents, although closely related chemically, have physical properties which are sufficiently different to permit the selection of the one which is best suited for a specific application. Because they are nonflammable, the hazards of fire and explosion have been eliminated. They are pure and uniform, hence can be recovered and reused many times with no alteration of their properties.

The large scale production of these nonflammable fluids has assisted materially in the development and extension of new processes such as vapor degreasing of metals, continuous scouring of wool and woolen piece goods conti. uous sterilization of canned goods in hot solvent vapor, and dry cleaning. Some of these processes are entirely new; others replace less desirable processes which were difficult to control because of the fire and explosion hazards. Today, nearly 300,000,000 pounds a year of these solvents are used in industrial processes.

Many of the new processes and improvements in existing processes which have been made possible by these synthetic solvents, are a result of industrial developments. Further development will naturally come about as a result of industry becoming better acquainted with synthetic solvents and their many applications.

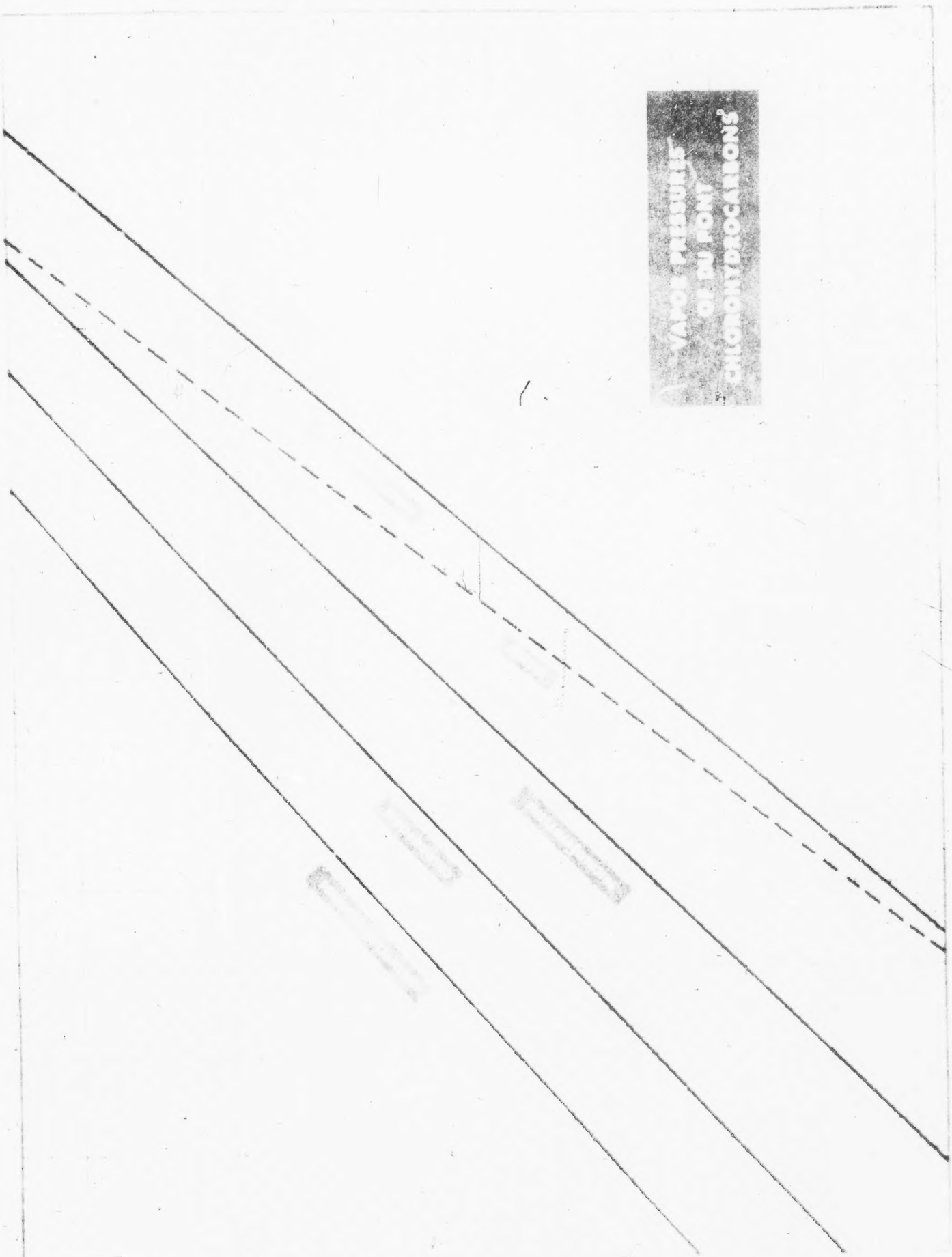
This book is designed to help in the selection of the solvent best fitted for a particular application. It contains detailed data on the chemical and physical properties of Du Pont Chlorinated Hydrocarbons. The physical properties of a number of other industrial solvents are listed in a convenient table. The practical, general information should be useful in the development of new processes and improvement in existing processes which can use solvents.

Specific Heat Liquid (20°C.)	0.276	0.234	0.225	0.205
Vapor (Cp) (1 atm.) cal./g./°C. or B.T.U./lb./°F.	0.155	0.142	0.156	0.146
	40°C.	61.2°C.	80°C.	100°C.
Critical Temperature °C.	245.0	262.9	271.0	347.1
°F.	473.0	505.2	519.8	656.8
Critical Pressure, atm.	60.9	53.8	49.5	—
Thermal Conductivity Liquid (20°C.)	0.0920	0.0751	0.0801	0.0732
Vapor (B.P.) B.T.U./hr. (sq. ft.) (°F./ft.)	0.00438	0.00455	0.00482	0.00505
Specific Gravity (20°/4°C.)	1.326	1.489	1.464	1.623
Pounds per Gal. (20°C.)	11.07	12.43	12.30 (15°C.)	13.55
Coefficient of Cubical Expansion —Av./°C. Liquid	0.00137 0°–40°C.	0.00129 0°–40°C.	0.00117 0°–40°C.	0.00102 0°–25°C.
Vapor Density g./liter	3.30	4.36	4.45	5.22
(B.P., 760 mm.) lb./cu. ft.	0.206	0.272	0.278	0.326
Specific Gravity (Air = 1.00)	2.93	4.13	4.54	5.83
Diffusivity in Air (25°C., 1 atm.), sq. cm./sec.	0.091	0.079	0.073	0.067
Evaporation Rate (ether = 100)	71	56	28	9
Solubility in Water (25°C.), g./100 g.	1.32	0.79	0.11	0.015
Solubility of Water in Chlorohydrocarbon (25°C.), g. Water/100 g.	0.170	0.083	0.027	0.0105
Viscosity Liquid (20°C.), Centipoises	0.430	0.57	0.58	0.88
Vapor	0.0109 (40°C.)	0.0115 (61°C.)	0.0103 (60°C.)	0.0099 (60°C.)
Refractive Index Liquid, N_D^{20}	1.4244	1.4455	1.4782	1.5044
Vapor	1.001055 (25°C.)	1.001436 (0°C.)	1.001784 (0°C.)	1.002009 (0°C.)
Surface Tension (in air), dynes/cm.	28.2 (20°C.)	26.2 (25°C., in N)	29 (30°C.) approx.	32.32 (20°C.)
Dielectric Constant Liquid	9.1 (20°C.)	4.785 (20°C.)	3.42 (16°C.)	2.365 (25°C.)
Vapor	1.0082 (40°C.)	1.00462 (69.6°C.)	—	—
Heat of Formation, kg.-cal./mole				
Liquid	28.6	31.2	+1	+3
Vapor	21.7	23.6	−7	−6
Flammability[1]				
Underwriters' Laboratories Rating	Nonflam.	Nonflam.	Nonflam. Rated 3	Nonflam. Rated 0
Flash Point °C.	—	—	—	—
°F.	—	—	—	—

[1]Those substances rated as moderately flammable by the Underwriters' Laboratories are stated to be much less hazardous than gasoline but more hazardous than ammonia. Trichlorethylene, Methylene Chloride, and Chloroform are practically nonflammable and nonexplosive at ordinary temperatures, but at higher temperatures under favorable conditions may form weakly combustible mixtures with air. The rating numbers accord with Underwriters' Laboratories standard of classification in which:

Ether rates	100
Gasoline rates	90-100
Alcohol (ethyl) rates	60- 70
Kerosene (100° F. flash) rates	30- 40
Paraffin oil rates	10- 20

Du Pont CHLORINATED HYDROCARBONS


CHRONOLOGICAL
NOT IN SCALE
VARVE THICKNESS

by the spray method because of its powerful solvent action and commercially satisfactory rate of evaporation. It must be remembered, however, that in any such mixture the differences in the respective rates of evaporation of the various components cause the composition of the blend to alter in time, and may lead to the formation of a flammable composition.

Dry Cleaning

Perchlorethylene and trichlorethylene are in common use as dry cleaning solvents. Here again, nonflammability and high solvent efficiency are of prime importance. Specially designed equipment assures efficient, economical, and safe operation. Both solvents remove grease, dirt, and oil from garments in a short time, and garments are left free from solvent odor. Since the solvents are low-boiling, they can be readily recovered by simple distillation. The Du Pont dry cleaning grades of perchlorethylene and trichlorethylene are sold under the trade-marks "Perclene" and "Triclene", respectively.

In textile manufacturing, trichlorethylene and, to a lesser extent, perchlorethylene are used in "Derby" continuous dry-cleaning units to remove spinning oils and accumulated soil from woolen piece goods. This method has the advantage of giving excellent cleaning at low cost with recovery of the valuable spinning oils.

Extraction

Many chlorinated hydrocarbons are used in the extraction field. The selection of the solvent depends upon many factors, such as solubility of the material being extracted, cost, and nature of the extraction process. The attractive combination of properties found in trichlorethylene have made it one of the more versatile extraction solvents, and Du Pont extraction-grade trichlorethylene has important commercial applications in the extraction of oils from oil bearing seeds (soybeans, etc.), meat scrap, raw wool, and of caffeine and a number of pharmaceuticals.

Methylene chloride is particularly suited for extraction processes where the extracted solids are heat-sensitive and solvent recovery must be carried out at low temperatures. The high stability of trichlorethylene and methylene chloride in the presence of water permits their complete removal from extracted oils by steam distillation. Where the extracted solids are not particularly heat sensitive, however, the intermediate boiling point of trichlorethylene permits complete removal of solvent from oil and meal, and efficient recovery in water cooled condensers supplied with city, river, or well water, even under summer conditions. Perchlorethylene may be applied to advantage in the combined drying-and-extraction of materials, such as raw meat scrap, which have a high moisture content. Its relatively high boiling point makes perchlorethylene somewhat more difficult to remove from the extraction products than trichlorethylene or methylene chloride. In such applications perchlorethylene serves as a heat transfer medium in driving off the water, and subsequently, as extractive solvent.

Refrigeration

Methylene chloride and, to a lesser extent, trichlorethylene are used as low-temperature heat transfer fluids because of favorable properties, including low freezing points.

(Du Pont also sells methyl chloride under the registered trade-mark "Artic", a widely used refrigerant for commercial and household units.)

Pharmaceutical

Some of the chlorinated hydrocarbons have been found valuable as solvents in preparations for destroying insects. The excellent solvent capacity of methylene chloride for many of the commonly used insecticides is utilized in aerosol mixtures. Perchlorethylene is used as anthelmintic

Other Applications

Other properties which make these materials of value or interest for industrial work include low electrical conductivity, high liquid and vapor densities and low solubility in water. Trichlorethylene and chloroform are used as freezing-point depressants for carbon tetrachloride fire-extinguishing fluid because of their low freezing-points and their ability to lower the freezing-point of carbon tetrachloride when added to the latter in small amounts.

Other examples of the diversified applications of chlorohydrocarbon solvents include the use of methylene chloride and trichlorethylene as oil-dewaxing compounds; methylene chloride in the preparation of highly efficient nonflammable paint removers; trichlorethylene for textile spotting and paint removal; perchlorethylene for metal, wood,

COMPARISON OF CHLORINATED HYDROCARBONS
with other
INDUSTRIAL ORGANIC SOLVENTS

SOLVENT	FORMULA	MOLECULAR WEIGHT	BOILING POINT (Latm.) °F	FREEZING POINT °F	VAPOR PRESSURE (68°F.) mm. Hg	LATENT HEAT OF VAPORIZATION (B.P.) BTU/lb.	SPECIFIC HEAT Liquid (68°F.) BTU/lb./°F.	SPECIFIC GRAVITY Liquid 68°/39°F.	SPECIFIC GRAVITY Vapor Air = 1.00	FLAMMABILITY Underwriters' Lab. Rating	FLAMMABILITY Flash Point °F.[2]	MAX. ALLOWABLE CONCN. p.p.m.[3]
CHLOROHYDROCARBONS												
Methylene Chloride	CH_2Cl_2	84.94	103.6	142.1	355	141.7	0.276	1.326	2.93	Nonflam.	—	200–500
Chloroform	$CHCl_3$	119.39	142.2	82.4	162	106.7	0.234	1.489	4.13	Nonflam.	—	75–100
Trichlorethylene	$CHCl:CCl_2$	131.40	188.4	123.5	57.8	103.0	0.225	1.464	4.54	3	—	100–200
Perchlorethylene	$CCl_2:CCl_2$	165.85	250.2	8.2	14.4	90.0	0.205	1.623	5.83	6	—	200
Methyl Chloride	CH_3Cl	50.49	10.8	143.7	3672	181.4	0.381	0.920	2.52[10]	Moderate	<32	100–500
Carbon Tetrachloride	CCl_4	153.84	169.7	9.1	90.0	84.2	0.205	1.594	5.32	0	—	50–100
Ethylene Dichloride	CH_2ClCH_2Cl	98.97	182.3	31.9	62.5	139.1[9]	0.308	1.253	3.42	60–70	56.0	75–100
Propylene Dichloride	$CH_3CHClCH_2Cl$	112.99	205.5	94	41.7	130.1[10]	0.22[10]	1.155	3.90	Moderate[11]	62.6	—
Tetrachlorethane	$CHCl_2CHCl_2$	167.86	295.3	0.5	5.4	98.8	0.268	1.596	5.79	Nonflam.	—	0.5–10[11]
Pentachlorethane	$CHCl_2CCl_3$	202.31	320.9	20.2	3.1	79.6[10]	0.215	1.681	6.99	Nonflam.[11]	—	—
KETONES												
Acetone	$(CH_3)_2CO$	58.08	133.0	137.7	186	224.1	0.527	0.792	2.00	90	0	200–1000
Methyl Ethyl Ketone	$(CH_3)CO(CH_2)CH_3$	72.10	175.3	123.4	76.3	190.6[10]	0.549	0.805	2.41	Flam.[11]	30	—
ESTER												
n-Butyl Acetate	$CH_3COOC_4H_9$	116.16	259.7	106.2	10.0	132.9[10]	0.4985[9]	0.88	4.00	Moderate[11]	72	150–400
ALCOHOLS												
Methyl Alcohol	CH_3OH	32.04	148.0	142.6	98.3	473.0	0.600	0.792	1.11	Moderate[11]	52	100–300
Ethyl Alcohol	C_2H_5OH	46.07	173.0	174.3	44.0	367.7	0.562	0.79	1.59	70	55	100–1000
iso-Propyl Alcohol	$(CH_3)_2CHOH$	60.09	180.4	129.1	34.0	286.8	0.606	0.789	2.07	70	53	100–400
CYCLIC ETHER												
Tetrahydrofuran	$(CH_2)_4O$	72.10	149.7	162.4	146	—	—	0.888	—	Flam.[11]	−4 Open Cup	<100 (Recommended)
HYDROCARBONS												
n-Hexane	C_6H_{14}	86.17	155.7	139.6	122	143.1	0.537	0.659	2.98	90–95	−15	1000
n-Heptane	C_7H_{16}	100.20	209.2	142.0	36.2	137.3	0.490	0.683	3.45	Flam.[11]	25	400–1000
Benzol	C_6H_6	78.11	176.2	42.01	75.5	169.7	0.406	0.88	2.77	95–100	12	50–100
Toluol	$C_6H_5CH_3$	92.13	231.1	139.0	22.0	156.3	0.392	0.886	3.14	75–80	40	100–200

(1) Those substances rated as moderately flammable by the Underwriters' Laboratories are stated to be much less hazardous than gasoline, but more hazardous than ammonia. Trichlorethylene, Methylene Chloride, Chloroform, and Tetrachlorethane are practically nonflammable and nonexplosive at ordinary temperatures, but at higher temperatures under favorable conditions may form weakly combustible mixtures with air. The rating numbers accord with Underwriters' Laboratories standard of classification in which:

- Ether rates 100
- Gasoline rates 90-100
- Alcohol (ethyl) rates 60- 70
- Kerosene (100° F. flash) rates 30- 40
- Paraffin oil rates 10- 20

Underwriters' data on flammabilities of those compounds referring directly to this footnote are not available: the information given for these is believed to be satisfactory for purposes of comparison.

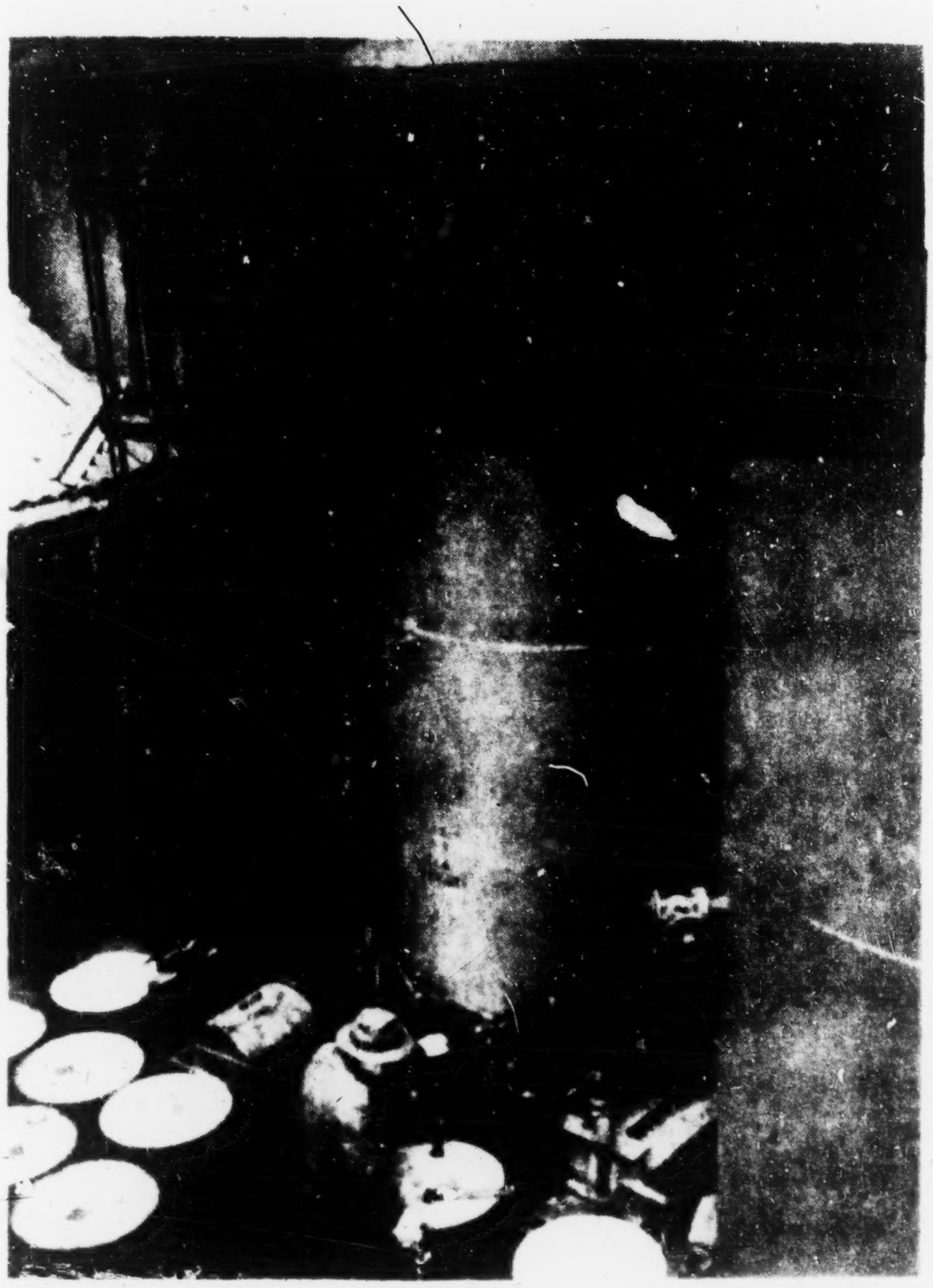
(2) Closed Cup, unless otherwise indicated. Wherever possible the data were taken from "National Fire Codes", Volume I (Flammable Liquids, Gases, Chemicals, and Explosives), National Fire Protection Association, Boston, 1948.

(3) With the exception of Tetrahydrofuran, the data given represent the range of maximum allowable concentrations of solvent vapors in air (in parts per million) for an eight-hour working day, as defined by the various state codes in 1947.

(4) 349-185° F.
(5) 296-316° F.
(6) 173° F.
(7) 255° F.
(8) 77°F
(9) 152.4°F.
(10) 5°F.
(11) Except in two states.

and other drying operations, and as a rubber solvent; chloroform as a solvent in vitamin manufacture. The U.S.P. grade of chloroform has a wide variety of uses in pharmaceuticals.

Du Pont also manufactures tetrachlorethane and pentachlorethane which are used as chemical intermediates and solvents.)



FLAMMABILITY RATINGS

None of these chlorohydrocarbons exhibits a flash point when tested by either the Cleveland Open Cup or the Tagliabue Closed Cup. Accordingly, they are not listed in Agent H. A. Campbell's Freight Tariff No. 4, which covers Interstate Commerce Commission Regulations on liquids having a flash point of 80 F. or lower.

Methylene Chloride is rated by the Underwriters' Laboratories as practically nonflammable at ordinary temperatures; trichlorethylene is rated nonflammable at ordinary temperatures. Chloroform and perchlorethylene are nonflammable. Methylene chloride, chloroform, and trichlorethylene form weakly combustible mixtures at high temperatures with high concentrations of solvent in air.

STABILITY

Methylene chloride, chloroform, trichlorethylene, and perchlorethylene are sufficiently stable for commercial use in such widely different applications as the extraction of animal and vegetable oils and fats, the degreasing of wool, textile cleaning, refrigeration by convection, and as utility solvents. Particularly rigorous conditions of use, however, such as those sometimes encountered in the degreasing and vapor drying of metal parts, may bring about a breakdown with formation of acidic decomposition products. For this reason the Du Pont degreasing grades of trichlorethylene and perchlorethylene are especially stabilized to resist such action.

Various members of the chlorinated hydrocarbon series may decompose through three fundamental causes to produce acidic decomposition products: (1) presence of air (oxidation), (2) presence of water (hydrolysis), and (3) high temperatures (pyrolysis). Some are also subject to a type of polymerization which might be termed "condensation". Oxidation is accelerated by higher temperatures and by certain metals and their salts. Decomposition of the oxidation or auto-oxidation type may be effectively controlled by very small amounts of inhibitors; such inhibitors or "stabilizers" as they are commonly known, are added to the Du Pont chlorinated hydrocarbons which might be subject to oxidation.

No successful inhibitors for hydrolysis of chlorinated hydrocarbons are known, however, the four materials discussed herein are not subject to appreciable hydrolysis under normal conditions of use.

The chlorinated hydrocarbons must be used below the temperatures at which significant pyrolysis takes place. Trichlorethylene, perchlorethylene, methylene chloride, and chloroform are extremely stable at their boiling points and, in practice, are generally used at temperatures of 20-30 C. (35-55 F.) above their boiling points. All of the chlorinated hydrocarbons will break down in direct flame or when in contact with very hot surfaces (above 400-500 C. or 752-932 F.).

MATERIALS OF CONSTRUCTION

All of the common engineering metals, including ordinary grades of iron and steel, tin (dipped or plated), brass, bronze, copper, lead, zinc, and gal-

vanized iron, may be used with the chlorinated hydrocarbons under normal conditions of use or under conditions where the formation of acidic decomposition products (see "Stability", above) is avoided. Aluminum is not generally satisfactory as a material of construction for equipment handling chlorinated solvents. However, aluminum articles are safely degreased in boiling trichlorethylene; in this case, time of contact is limited and proper control allows the solvent to be kept free from finely divided aluminum and aluminum corrosion products which tend to promote decomposition of the solvent.

In selecting materials of construction, due consideration must be given to the ease with which the metal surface can oxidize. As discussed above, under normal conditions of industrial use, methylene chloride, chloroform, trichlorethylene, and perchlorethylene will not decompose to a sufficient extent to cause corrosion of the common metals. Like other grease solvents, however, the Du Pont chlorinated hydrocarbons do remove protective oils, waxes, grease, etc., from metal surfaces thereby permitting rusting in the presence of air and or water. Accordingly, under some conditions of use it is necessary to utilize nonoxidizing surfaces such as galvanized iron, nickel, tinned copper, and the various chrome-nickle stainless steels.

SAFETY PRECAUTIONS

The degree of toxicity of the several chlorinated hydrocarbons varies considerably: chloroform is considered moderately toxic; methylene chloride, trichlorethylene, and perchlorethylene are among the least toxic of the chlorohydrocarbon group of chemicals.

Trichlorethylene, perchlorethylene, and methylene chloride have some narcotic action. Symptoms of exposure to excessive concentrations include headache, undue fatigue, or nausea. On access to fresh air, the solvents are rapidly eliminated from the body and the symptoms disappear quickly, leaving no permanent effects on the body organs.

Contact of the skin with chlorinated hydrocarbons and their vapors should be minimized, because absorption through the pores may produce the same physiological effect as inhalation and by removing natural skin oils can cause excessive skin dryness or "chapping". Lanolin salve relieves skin dryness by replacing lost natural oils. Contact of vapors with the eyes should be particularly avoided because of the sensitiveness of these organs. Obviously, the chlorohydrocarbons must not be taken internally.

On exposure to high temperatures (e.g., open flames or open electric heaters) the chlorohydrocarbons may decompose to toxic and corrosive substances; such combustion products should be vented to the outside through corrosion-resistant ducts.

Systems using chlorinated hydrocarbons should be well designed and maintained to minimize leakage of vapors into working areas. In addition to the standard methods of analyzing for chlorohydrocarbon vapors in air, the vapors may be quickly detected and estimated with the Du Pont Chlorohydrocarbon Analyzer. This instrument measures photoelectrically the spectral line of copper halide formed by the action of the chlorohydrocarbon on copper in a flaming arc electrode system. The Analyzer is manufactured and sold by Davis Emergency Equipment Co., Inc., Newark, N. J.

Years of experience in the manufacture, handling, and use in hundreds of plants have demonstrated that the Du Pont chlorinated hydrocarbons may be used in properly designed, operated, and maintained equipment with negligible health hazard. Inasmuch as the manner of handling and using these products after they leave the factory is entirely beyond the control of the supplier, no guarantee can be implied as to the effects of their use or their toxic effects, whether or not they are used in accordance with recommended procedures.

TECHNICAL SERVICE

The Electrochemicals Department, E. I. du Pont de Nemours & Company, has had more than 25 years of experience in manufacturing, handling, and servicing chlorinated hydrocarbons. Upon request, the following customer services are available: assistance in applying any of the materials for particular purposes; additional technical data; services of experienced engineers for consultation on equipment design, plant layout, and materials handling; assistance of technical servicemen (Coast-to-Coast service); laboratory analysis of products; and service laboratory evaluation of processes. For prompt service, write to the nearest office (see below) or to your supplier of Du Pont solvents.

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DISTRICT OFFICES

BALTIMORE 2, M	Plaza 2862
321 Fallsway	
BOSTON 10, MASS.	Hancock 6-1714
140 Federal Street	
CHARLOTTE 2, N. C.	5-5561
427 W. Fourth Street	
CHICAGO 3, ILL.	Andover 3-7000
7 S. Dearborn Street	
CINCINNATI 2, OHIO	Parkway 5253
2412 Carew Tower	
CLEVELAND 14, OHIO	Cherry 1-6078
1226 Nat. City Bank Bldg.	
DALLAS* 10, TEXAS	Harwood 7666
3rd and Borich Streets	
DETROIT 26, MICH.	Woodward 2-7360
966 Penobscot Bldg.	
HOUSTON* 7, TEXAS	Preston 4133
2812 Center Street	
KANSAS CITY* 1, MO.	Victor 6240
Guinotte and Mich. Aves.	
LOS ANGELES, CALIF.	Cumberland 3-2761
P. O. Box 70, El Monte, Calif.	
NEW ORLEANS* 18, LA.	Walnut 4527
Maple and Leak Aves.	
NEW YORK 1, N. Y.	Longacre 3-6440
350 Fifth Avenue	
OKLAHOMA CITY* 2, OKLA.	2-2512
203 S. Compress Street	
PHILADELPHIA 3, PA.	Kingsley 5-1900
1616 Walnut Street	
PITTSBURGH 22, PA.	Grant 1-2961
517 Park Building	
SAN FRANCISCO 6, CALIF.	Exbrook 2-6230
235 Second Street	
TULSA* 3, OKLA.	5-1251
26 N. Guthrie Street	
WICHITA* 2, KANS.	2-4156
223 S. Wichita Street	

*Barada & Page, Inc."

Export Division
Du Pont Building, Wilmington 98, Delaware

E. I. DU PONT DE NEMOURS & CO. (INC.), WILMINGTON 98, DEL.
ELECTROCHEMICALS DEPARTMENT

DU PONT

BETTER THINGS FOR BETTER LIVING . . . *THROUGH CHEMISTRY*

535

MAGNOLIA SOY PRODUCTS CO.

P. O. BOX 183

GREENVILLE, MISS.

February 14, 1952

RSA | WSP
PA | PR
MP | JS
OWC | CRC
APS
WU
GAN
FILE
Return to

Mr. C. B. Shepherd, Manager,
Chlorine Products Division
E. I. DuPont Company,
Wilmington, Delaware.

Date
Gov't. ( )
Plf. ( )
Dft. ( )
Exhibit No. D 8
Witness Ford Cross
Reporter

Dear Mr. Shepherd:

Some eighty head of cattle have died recently in the vicinity of Poplarville, Mississippi, the cause of which has been traced to feeding soybean meal made in our plant. We are facing a lawsuit which brings into sharp focus the necessity of some sort of action. The worst possible publicity is shaping up and we are advised that political action to bar use of our meal in this state is to follow. Further, we have encountered growing resistance to the use of our meal in areas outside of Mississippi, with some cancellations of contracts.

To date we have had not too much trouble marketing our meal. This is because there has developed a shortage of protein in the drouth area of the Southwest. This condition will not last indefinitely and we will be faced wwith the problem of selling our meal in a competitive market. It is self-evident that we cannot continue selling meal that is limited to certain uses in a competitive market.

At the timewe were planning the building of this mill the question was raised by us as to the quality of the meal and whether meal made by trichlorethylene extraction was actually harmful tocattle. On August 11,1950, you wrote us that in no cases where the meal was properly manufactured was there any record of ill effects on cattle. We assumed that by offering trichlorethylene for sale and promoting the use of it that you had gone far enough with the development to know for certainthat it was safe.

On July 31,1951 you wrote that some trouble had developed from feeding trichlorethylene extracted meal and advised us to channel our meal to poultry and hog feeders. At a conference this week with Stuart Armstrong we learned that no quick solution to the problem was anticipated.

We cannot consider operating this mill with trichlorethylene until the toxicity problem is solved. That is not in sight. We seem to have no alternative except to convert to hexane, much as we dislike to do that.

We feel that DuPont is in large measure responsible for the position we find ourselves in because of the fact that that you did promote the use of trichlorethylene and disseminated information indicating it was safe to use. For this reason we are asking that DuPont share the responsibility.

We shall need to borrow $100,000 to convert our mill and, due to other obligations we are unable to finance this thru regular channels. We have a corporation with paid in capital of $250,000 and we have outstanding obligations

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MAGNOLIA SOY PRODUCTS CO.

P. O. BOX 183

GREENVILLE, MISS.

amounting to $240,000 in first and second mortgages. The appraised value of the property is $493,211.

A loan of $100,000 would suit our plans better than any other method at present. Our common stock could be increased by $150,000 and stillleave us within the bounds of reasonable capitalization.

Since we feel that DuPont is responsible for the situation we find ourselves in, we are expecting you to assist us by making us this loan or, if preferred, taking an equal amount of common stock. By suggesting two ways to go we only mean to try to avoid setting a precedent as Mr.Armstrong pointed out as a thing to be avoided.

This soybean mill was built by the writer and Lyman Reed doing business as L.L.Ford Associates and sold to the Magnolia Soy products Company. The majority stockholders are threatening action against L.L.Ford Associates to recover the cost of the extraction plant which amounts to $265,000. The L.L.Ford Associates are in no position to take this responsibility alone.

Respectfully,

MAGNOLIA SOY PRODUCTS COMPANY

L.L.Ford

2-18-Dept
Loan Loan - Ford
WC
JT

537

FEEDSTUFFS

★ A WEEKLY NEWSPAPER ★

FOR THE FEED MANUFACTURER, JOBBER, BROKER and DEALER

23—Number 40 OCTOBER 6, 1951 1 Year $4, 2 Yea

New Screenings Definition Liste

ACTION TAKEN AT MEETING OF FEED CONTROL OFFICIALS

Organization Also Goes on Record Against Use of Trichloroethylene Solvent Extracted Soybean Oil Meal for Calves, Dairy and Beef Cattle

WASHINGTON—Action toward revising screenings definitions and a resolution expressing a recommended attitude toward soybean oil meal when trichloroethylene is used as a solvent were among the developments of greatest immediate interest to the feed industry occurring at the 41st annual convention of the Association of American Feed Control Officials. The meeting was held in Washington Oct. 3-4.

The resolution on trichloroethylene reads: "Resolved, that this association goes on record as discouraging the use of trichloroethylene solvent extracted soybean oil meal, flakes or pellets in rations for calves, dairy and beef cattle, until it has been proven that these products are nontoxic to such animals, and that, when these products are sold or offered for sale, the process of manufacture, and a warning statement prohibiting their use in rations for calves, dairy and beef cattle, shall be stated on label."

Label Adopted

Trichloroethylene has been used as a solvent in a small number of soybean processing plants during the past two or three years. Rather mysterious increase in mortality of ruminants in parts of the Middle West has been suspected of being caused by the feeding of soybean oil meal manufactured by the process, although this has not been definitely established.

The University of Minnesota recently undertook a research project try to determine the exact cause of the cattle deaths, and the part, if any, that trichloroethylene had in them.

In the meantime, the type of label and warning now recommended by the feed control officials has been

(Continued on page 8)

(Continued from page 1)

adopted voluntarily by the four members of the National Soybean Processors Assn. who have been using the solvent.

It has been emphasized that other types of solvents used in extracting oil from soybeans are not under suspicion, and also that there has been no evidence that soybean products manufactured with the use of trichloroethylene have any deleterious effect on poultry or on animals other than ruminants.

Date 4-28-55 Exhibit No. D 9
Witness Armstrong
Cont. ( )
Pet. ( )
Def. ( ) Jay McDiarmid
Reporter

9 C J

538

RC-6614

DU PONT
REG. U.S. PAT. OFF.
ESTABLISHED 1802

E. I. DU PONT DE NEMOURS & COMPANY
INCORPORATED
WILMINGTON 98, DELAWARE

ELECTROCHEMICALS DEPARTMENT

July 31, 1951

Mr. Lyman Reed, Sales Manager
Magnolia Soy Products Company
Greenville, Mississippi

Dear Mr. Reed:

In recent months, there have been increasing indications that trichlorethylene-extracted soybean meal may be associated with a hemorrhagic disease in cattle which has been observed in widely-scattered areas. Research programs are now being undertaken by the University of Minnesota and Iowa State College to investigate the nature and causes of the disease and to determine if trichlorethylene-extracted meal is, in fact, a contributory factor.

The cause of the disease is unknown. The evidence that trichlorethylene-extracted meal is associated in any way with the disease is entirely circumstantial, but the most recent reports have all come from farms using this type of meal in their cattle feed. Thus, despite the satisfactory experience with trichlorethylene-extracted meal in the past, we cannot ignore the possibility that this meal under certain conditions, perhaps in combination with one or more other factors, may be associated with the particular hemorrhagic disease observed in Minnesota and other scattered points.

In view of the present uncertainty, we strongly recommend that sales of trichlorethylene-extracted meal be confined to outlets other than cattle feed until more definite information is available from the investigations now underway in Minnesota and Iowa. To the best of our knowledge, the hemorrhagic disease in question is peculiar to cattle only, and all the available evidence and experience indicates that trichlorethylene-extracted meal is entirely satisfactory as a component for feeding hogs and poultry.

Very truly yours,

C. B. Shepherd

C. B. Shepherd, Manager
Chlorine Products Division

CBS/a

All Pffs
Date 11-26-55 Exhibit No. 35
Gov't. ( )
Plf. (X)
Dft. (X) 10
Witness Ford
Reporter Fay McKinnie

909

539

Received from
MAIL CT. RECORDS

FEB 28 19[illegible]

DUPONT

ORIGINAL ORDER

E. I. DU PONT DE NEMOURS & COMPANY
INCORPORATED

ORDER NUMBER
NY 45358

ELECTROCHEMICALS DEPT

RETURN TO CARTON

ORDER NUMBER	INVOICE NUMBER
NY 45358	14[illegible]

NO. SOLD TO MAGNOLIA SOY PRODUCTS CO
GREENVILLE MISSISSIPPI

DATE ENTERED 10/2/51
DATE OF INVOICE 11/21/51

CONSIGNED TO ORDER OF E I DU PONT DE NEMOURS & CO INC ELECTROCHEMICALS DEPT

DESTINATION GREENVILLE STATE MISS COUNTY

NOTIFY MAGNOLIA SOY PRODUCTS CO

AT GREENVILLE STATE MISS COUNTY

ROUTE ERIE SUPERIOR [illegible] GT CN GT IC COLLECT

DELIVERING CARRIER

CAR OR VEHICLE INITIALS [illegible] E NUMBER 36451

SHIPPING POINT X NIAGARA FALLS NY

SHIPPING DATE 11/19/51

CUSTOMER'S ORDER NO.

TERMS	TERRITORY	INDUSTRY	USE	THROUGH
2/10 NET 2/1	11	060	27	

NO. PACKAGES	FREIGHT CLASSIFICATION, DESCRIPTION OF MERCHANDISE ORDERED, MARKS AND NUMBERS	PRICE	AMOUNT	TOTAL
52	[redacted] TRICHLORETHYLENE EXTRACTION GRADE 650 LBS EACH 33800 LBS NET OR 36527 LBS MISS MISSISSIPPI SALE TAX EXEMPT	.11 LB FOB PLANT NIAGARA FALLS NY		3718.00

Date
Gov't. ( )
Pl. ( )
Dft. (1)

Exhibit No. D11
Witness Shepherd
5
Reporter

SHIPPERS BILLING INSTRUCTIONS
CODE
NR

X NIAGARA FALLS NY
B/L NF 270304

RECEIVED BY
ORDER TRANS.
BILLING
STOCK
FILING

Rec'd Cashier

1

GC

1 KC

540

E. I. DU PONT DE NEMOURS & COMPANY (INC.), ELECTROCHEMICALS DEPT., WILMINGTON, DEL.

FACTORY SHIPPING ADVICE

SHIPPING DATE 11-19-51

FACTORY: AFTER SHIPMENT MAIL WITH BILLS OF LADING TO NEW YORK NY

No. NY/45358 270504

SOLD TO [redacted]

DATE ENTERED 10/2/51

CONSIGNED TO ORDER OF E I DU PONT DE NEMOURS & CO INC ELECTROCHEMICALS DEPT

DESTINATION GREENVILLE STATE MISS COUNTY

NOTIFY MAGNOLIA SOY PRODUCTS CO

AT GREENVILLE STATE MISS COUNTY

ROUTE ERIE SUPERIOR BRIDGE GT CN GT IC COLLECT

DELIVERING CARRIER CAR OR VEHICLE INITIALS B&LE NUMBER 90151

SHIPPING POINT X NIAGARA FALLS NY SHIP 11/19/51

SHIPPING DATE NOV 19 1951 W.O.S. CUSTOMER'S ORDER NO. 112

TERMS	TERRITORY	INDUSTRY	LINE	THROUGH
S/D AGAINST B/L	11	060	27	

NO. PACKAGES	FREIGHT CLASSIFICATION, DESCRIPTION OF MERCHANDISE ORDERED, MARKS AND NUMBERS	GROSS WEIGHT
52	DRUMS TRICHLORETHYLENE IN BULK	36452
		75
		36527
	650 LBS EACH 33800 LBS NET TRICHLORETHYLENE EXTRACTION GRADE	.11 LB FOB PLANT NIAGARA FALLS NY - DRUMS INCL
	OR LBS	
	MISSISSIPPI SALE TAX EXEMPT	
	Sales 121784-785	

3718.00

Date
Govt. ( )
( )
( )

Exhibit No. D12
Witness
Reporter

SHIPPERS X NIAGARA FALLS NY

CODE NR

DM FILLED BY
CHECKED BY
RECEIVED BY

RECEIVED NOV 19 1951 NIAGARA FALLS N.Y.

FACTORY: AFTER SHIPMENT FILL IN PARTICULARS AND PROMPTLY MAIL THIS COPY WITH SHIPPING DOCUMENTS TO BILLING OFFICE SHOWN ON HEADING.

911

527

E.I. DU PONT DE NEMOURS & COMPANY
INCORPORATED

DU PONT

EC-7010-A

ELECTROCHEMICALS DEPT.

NEW YORK NY

ORDER NUMBER
NY 45358

SOLD TO MAGNOLIA SOY PRODUCTS CO
GREENVILLE MISSISSIPPI

DATE ENTERED 10/2/51

CONSIGNED TO ORDER OF E I DU PONT DE NEMOURS & CO INC ELECTROCHEMICALS DEPT

DESTINATION GREENVILLE STATE MISS COUNTY

NOTIFY MAGNOLIA SOY PRODUCTS CO

AT GREENVILLE STATE MISS COUNTY

ROUTE ERIE SUPERIOR BRIDGE GT CN GT IC COLLECT

DELIVERING CARRIER — CAR OR VEHICLE INITIALS — NUMBER

SHIPPING POINT X NIAGARA FALLS NY SHIP 10/19/51

SHIPPING DATE — CUSTOMER'S ORDER NO.

TERMS	TERRITORY	INDUSTRY	USE	THROUGH
S/D AGAINST B/L	11	060	27	

NO. PACKAGES	FREIGHT CLASSIFICATION, DESCRIPTION OF MERCHANDISE ORDERED, MARKS AND NUMBERS	PRICE
52	DRUMS TRICHLORETHYLENE IN BULK 650 LBS EACH 33800 LBS NET TRICHLORETHYLENE EXTRACTION GRADE GR LBS MISSISSIPPI SALES TAX EXEMPT	.11 LB FOB PLANT NIAGARA FALLS NY - DRUMS INCL

ORDER

ACKNOWLEDGMENT OF

To the extent that this order is covered by contract between us, it is accepted on the terms and conditions set forth in such contract. To the extent this order is not covered by contract, Seller assumes no obligation except in conformity with the conditions printed on the reverse side hereof.

E. I. DU PONT DE NEMOURS & CO.
INCORPORATED
ELECTROCHEMICALS DEPT.

SHIPPERS BILLING INSTRUCTIONS

X NIAGARA FALLS NY

DM

CODE
NR

Date
Govt. ( )
Plf. ( )
Def. ( )

Exhibit No. D 13
Witness Shufkind

7.20

7/2

CONDITIONS

1. Seller's liability as to delivery ceases upon making delivery of material purchased hereunder to carrier at shipping point in good condition, the carrier acting as Buyer's agent.

2. Except as otherwise provided in condition 9 hereof, Seller makes no warranty of any kind, expressed or implied, except that the goods sold hereunder shall be of merchantable quality; and Buyer assumes all risk and liability for results obtained by the use of the material covered by this order, whether used singly or in combination with other products.

3. No claim of any kind, whether as to goods delivered or for non-delivery of goods, shall be greater in amount than the purchase price of the goods in respect of which such damages are claimed; and failure to give notice of claim within ten (10) days from date of delivery, or the date fixed for delivery, respectively, shall constitute a waiver by Buyer of all claims in respect of such goods. No charges or expenses incident to any claims will be allowed unless approved by an authorized representative of Seller. Goods shall not be returned to Seller without Seller's permission.

4. All returnable containers used in connection with shipments of our material are the property of the Seller and are loaned to the Buyer. Buyer shall use such containers only for reasonable storage of Seller's goods originally delivered therein and shall return such containers in good condition within two (2) months from date of original shipment. Buyer shall make a deposit at the time of shipment of Seller's current charge for such containers as security for their return. Such deposit shall be paid, without discount, when the invoice for the contents is paid. Upon return of such containers as above provided, Seller shall credit Buyer with the amount of said deposit; but if Buyer fails to return said containers in good condition and within the specified time, Seller may refuse to accept same and may retain said deposit.
If the material covered by this order, is shipped in tank cars furnished by the Seller, the Buyer agrees that such tank cars will be unloaded within forty-eight (48) hours (Sundays and holidays excepted) after receipt thereof.

5. The terms of payment applicable to this order are Seller's regular terms or those specifically quoted to Buyer. In the event Buyer fails to fulfill the terms of payment, or in case Seller shall have any doubt at any time as to Buyer's financial responsibility, Seller may decline to make further deliveries except upon receipt of cash or satisfactory security.

6. Buyer shall reimburse Seller for all taxes, excises or other charges which Seller may be required to pay to any government (national, state or local) upon the sale, production or transportation, of the commodities sold hereunder.

7. No liability shall result from delay in performance, or non-performance, caused by circumstances beyond the control of the party affected, including, but not limited to, Act of God, fire, flood, war, government action, accident, labor trouble or shortage, inability to obtain material, equipment or transportation. Quantities so affected may be eliminated without liability, but the order shall remain otherwise unaffected. Seller reserves the right to reject or defer shipment of all or part of Buyer's order, without liability therefor, and Buyer may purchase elsewhere any quantities so rejected or deferred.

8. This order is not assignable or transferable by Buyer, in whole or in part, except with the written consent of Seller.

9. Seller warrants that the use or sale of the material delivered hereunder will infringe no claim of any United States patent covering the material itself; but does not warrant against infringement by reason of the use thereof in combination with other material or in the operation of any process.

10. The prices stated herein may be adjusted by Seller as of the beginning of any calendar month by so notifying Buyer in writing at any time prior to the effective date of such change. Such price or prices shall be paid for all material shipped hereunder on and after the date it becomes effective, unless subsequently again revised by Seller as provided herein. If unwilling to accept a price adjustment with respect to any product, Buyer may cancel this order in so far as it relates to such product by notifying Seller in writing within ten (10) days after receipt of Seller's notice, but the order shall remain in effect with respect to all other products. In the event of any Governmental action or request which prevents Seller from making a price increase or continuing any price already in effect, Seller, by giving Buyer ten (10) days' prior written notice, may terminate this order.

11. This instrument contains all the terms and conditions with respect to the sale and purchase of the material named herein, and no modification of these terms and conditions shall be of any force unless such modification shall be signed by the party claimed to be bound thereby.

Exact Copy GS-3 L R Burroughs Agent

2084—11-48—OP3 (Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 16, 1922, as amended August 1, 1930 and June 15, 1941) 1st SHEET

ILLINOIS CENTRAL

UNIFORM STRAIGHT BILL OF LADING

ORIGINAL—NOT NEGOTIABLE

Shipper's No. 11/17/55

Agent's No.

ILLINOIS CENTRAL RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading,

at Greenville, Miss 11/23, 1951, 19—

from Magnolia Soy Products Co.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to M. L. Richeson & Son

Destination New Orleans State of La County of —

Route 1 Ic

Delivering Carrier WA 104208 Car Initial I C Car No. 27893

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
1000	Sx Soybean Meal	100750	30½	+62
	FOR EXPORT			
	SS. Steel Maker			
	loaded in accordance with	ICC		D 11-9
	Service Order #874			
	Brode 7320			
	Booking No. NYK II 2051			
	Seals 2.28731K-94R			
		Med 1145a 11/24/51		

Copy

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

To be prepaid

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

Per Sol Shannon

Magnolia Soy Products Co Shipper.

Per

Received 11,455 A A Agent.

Per 23 Nov 51

Permanent postoffice address of Shipper

Cordially Yours—Illinois Central

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CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for ordinary damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classifications or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall — at first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expenses of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges: Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property, but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued to the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, is or is in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Revised June 15, 1941)

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Copies Copy

THIS MEMORANDUM

Shipper's No. 11/17/55

Agent's No.

ILLINOIS CENTRAL RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading,

at Greenville, Miss 11/26, 19 55

from Magnolia Soy Products Co

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to Isthmian Steamship Co. (Mail or street address of consignee—For purposes of notification only.)

Destination Mobile State of Ala County of

Route I C Newton - GM&O

Delivering Carrier 203206 Car Initial IC Car No. 22231

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
1000	M Soybean Meal	100750	53	
	FOR EXPORT			
	SS Stolsnaben			
	Loaded in accordance with ICC			
	Service Order #874			
	Export Meal for Brode			
	Booking No. NYK 112051			
	Seals 22881K - 82K			

Dest 11-28-55 Exhibit 1 Orig Bill of Lading Dest 4 Shipper's Weight

Seal showed Rec'd 10:22, Nov 26, 55

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

To be prepaid

Received $ 325.23 to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

I C R R Agent

Per

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per

Magnolia Soy Products Co Shipper.

Per BM

Permanent postoffice address of Shipper

Jr Traffic Agent

Per

Agent

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Cordially Yours — Illinois Central

G/E

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Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property, but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Revised June 15, 1941)

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Exact Copy L R Burroughs Agent

5565—11-50—OPO

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 16, 1922, as amended August 1, 1930 and June 16, 1941.)

1st SHEET

UNIFORM STRAIGHT BILL OF LADING

Shipper's No. 11/17/51

ORIGINAL—NOT NEGOTIABLE

Agent's No.

ILLINOIS CENTRAL RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading,

at Greenville, Miss 11/23, 19 51

from Magnolia Soy Products Co

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to W. L. Richeson & Son

Destination New Orleans State of La County of

Route I C

Delivering Carrier Car Initial IC Car No. 32008

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
1000 sx	Soybean Meal	100750	30½	
			6% Cl	
	For Export			
	SS. Steel Stakes			
	Loaded in accordance with	ICC		
	Service Order # 874			
	Export Meal for Brode			
	Packing No NYK 112051/25			
	Sals 22875K - 76K			
	Copy			

Detail 55 Exhibit "A" Dkt
Govt ( ) Witness
Pkt ( ) Received
Bill ( ) Delivered

Seal Shipper
Sealed 6:30 PM
23 Nov 51

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per JF Frye Agent ICRR

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

To be prepaid

Received $
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

Magnolia Soy Products Co Shipper. Agent

Per BM Per

Permanent postoffice address of Shipper

Cordially Yours—Illinois Central

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CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the public authority, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehousemen, only, for loss, damage, or delay caused by the occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for ordinary damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expenses they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: *Provided*, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be liable for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehousemen, only, or at the option of the carrier may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where perishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: *Provided*, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: *Provided*, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: *Provided*, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expenses of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. *Provided*, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the consignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to coal and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforced according to its original tenor.

(*Revised June 15, 1941*)

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Exact Copy J R Burroughs Agent

20M—11-53—CPC (For use in connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.) 2nd SHEET

ILLINOIS CENTRAL

THIS SHIPPING ORDER must be legibly filled in, in ink, in indelible pencil, or in carbon and retained by the Agent.

Shipper's No. 11/27/51

Agent's No. _____

ILLINOIS CENTRAL RAILROAD COMPANY

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order,

at Gulfport Miss 11/26, 19 51

from Mocnelia Soy Products Co

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to Lothman Steamship Co (Mail or street address of consignee—For purposes of notification only.)

Destination Mobile State of Ala County of —

Route I C Newton - GM & O

Delivering Carrier 202x07 Car Initial NYC Car No. 128296

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
1091 sx	Cottonseed Meal	100750	30½	
	For Export		6%	
	to Malmaker			
	loaded in accordance with ICC Service			
	Order # 874 - Export meal for Bonded			
	Booking No NYK 11205			
	Seals 22879K-80K			

Date 12-28-51 Exhibit No. _____

Gov't. ( ) Witness _____

Pilf ( ) Counsel _____

Dis. ( ) Ex. _____

Larry McAmis Reporter

Seal Shown as'd 10:15AM Nov 26 1951

Copy

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

To be prepaid

Received $ 9.25.23 to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$ _____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____

per _____

Mocnelia Soy Products Co, Shipper.

Per BM

Permanent postoffice address of Shipper _____

Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

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Cordially Yours — Illinois Central

550

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped under notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier in its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expenses of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or inlets, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect and this bill of lading shall be enforceable according to its original tenor.

(Revised June 16, 1941)

449 92

551

Exact Copy Dec 10-57 L K Burroughs Agent

Over use in connection with I and Illinois Classification

rm Straight Bill of Lading, adopted by C... criterion, March 25, 1922, as amended August 1, ... 20, and June 16, 1941.)

11/17/57 SHEET

THIS MEMORANDUM is an acknowledgment that a Bill of Lading has been issued and the Original Bill of Lading or a copy or duplicate covering the property named herein, and is intended solely for filing or record.

Shipper's No.

Agent's No.

ILLINOIS CENTRAL RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading,

at Greenville Miss Dec 8th 1957

from Magnolia Soy Products Co

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to W.L. Richeson & Son (Mail or street address of consignee—For purposes of notification only.)

Destination New Orleans State of La County of

Route IC

Delivering Carrier Car Initial Ger Car No. 22061

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
1000	bs Soybean Meal	100750	20½	
	For export		60/e	
	For Barking or Hawaiian Steamer			
	Booking No My 11225 1-B			
	Loaded in Accordance with Dec Amend			
	order # 874.			
		Date 12-4-57 Exhibit to D&S B		
	SLSC	Over ( ) Wilson		
		Init. ( ) Counsel		
		Del. ( ) Lee Thomas		
	Seals 29612 K - 12 K	Inspector		

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

To be prepaid

Received $ 325.70 to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

*If the shipment moves between two ports by a carrier by water, the law requires that the Bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

Copy

Magnolia Soy Products Co Shipper. J F Keys Agent

© Per Per

Permanent postoffice address of Shipper

Cordially Yours — Illinois Central

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552

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Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property, but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(*Revised June 15, 1941*)

D 15 - B 1

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Exam Copy L R Burroughs Agent 11/17/55

THIS SHIPPING ORDER

Shipper's No.

Agent's No.

ILLINOIS CENTRAL RAILROAD COMPANY

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order,

at Greenville Miss 12/10 1951, 19

from Magnolia Soy Prod Co

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to W L Lyons Brooks Inc (Mail or street address of consignee—For purposes of notification only.) Date 11-22-51

Destination New Orleans State of La

Route IC

Delivering Carrier Car Initial NH Car No. 33672

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
1000 Bx	Soybean Meal	100750	30¢	
	Sacks		6¢	
	For Baking or Hawaiian Sweet Bread Mix Ng 112251-6			
	Loaded in Accordance with ICC Service Order #874			
	AFTC			
	Seals 29618 K - 19K			
	Copy			

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

to be prepaid

Received $ 3.25.73 to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per

Magnolia Soy Prod Co Shipper.

© Per BM

Permanent postoffice address of Shipper

Agent must sign this Shipping Order and retain the Original Bill of Lading.

by

Cordially Yours — Illinois Central R.R. Co.

GAY

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CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehousemen, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession, (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower valuation than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburses the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviations or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehousemen, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expenses of notice, advertisement, sale, and other necessary expenses and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignee shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a statement of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property, but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section, and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to sail in any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Revised June 18, 1941)

D 159

EXHIBIT NO. D 16.

New York:

We also respectfully request this Honorable Court to take judicial notice of the law of the State of New York whereby, by the undisputed evidence, the contract of sale by the Defendant of its product, trichloroethylene, was made, either on the bilateral contract theory of where the confirmation was released or on the unilateral contract theory of where the goods were shipped F.O.B. carrier (New York City or Niagara Falls—both of New York State).

The Court's attention is called to the leading cases of Chysky v. Drake Brothers Company, 235 N.Y. 468, 139 N.E. 576, 27 A.L.R. 1533 (1923); Timpson v. Marshall, Meadows & Steward, 101 N.Y.S.2d 583, 198 Misc. 103 (1950); Day v. Grand Union Co., 113 N.Y.S.-2d 436 (1952); and Blessington v. McCrory Stores Corp., 109 N.Y.S.2d 719, affirmed 111 N.E.2d 421 (1953).

An excellent statement of the New York law appears in the case of Heggblom v. John Wannamaker, New York, 36 N.W.S.2d 777, 178 Misc. 792 (1942), as follows:

"The amended complaint does not allege that either of the plaintiffs purchased the exerciser from the defendant and in the absence of an allegation of privity of contract between plaintiffs and defendant, the first cause of action based on breach of warranty cannot be sustained. 'Warranty is an incident of a sale. * * * There can be no warranty where there is no privity of contract.' Turner v. Edison Storage Bat-

tery Co., 248 N.Y. 73, 161 N.E. 423. 'The general rule is that a manufacturer or seller of food, or other articles of personal property, is not liable to third persons, under an implied warranty, who have no contractual relations with him. The reason for this rule is that privity of contract does not exist between the seller and such third persons, and unless there be privity of contract, there can be no implied warranty. The benefit of a warranty, either express or implied, does not run with a chattel on its resale, and in this respect is unlike a covenant running with the land so as to give a subsequent purchaser a right of action against the original seller on a warranty.' "

The premises sought to be established is that under the law of the place where the contract was made—which controls the incidents thereof as an elementary principle of law—privity of contract is necessary before contract rights, including warranty obligations, can arise or exist.

The Court's attention is also respectfully directed to the fact that the State of New York—contrary to the majority rule—even requires privity in cases involving products designed for human consumption, thus emphasizing the primary importance that the Courts of New York have given to the element of privity.

SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
NOV 15 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 615

GEORGE T. NISHIDA and JAMES E. NISHIDA, d/b/a Hilo Dairy Company of Kauai, RYOJU SOKEI, d/b/a Sokei Dairy, and FRED L. WALDRON, LIMITED,
Petitioners,

vs.

E. I. DU PONT DE NEMOURS & COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROGER E. BROOKS,
923 20th Street, N. W.,
Washington 6, D. C.

C. NILS TAVARES,
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III. The Circuit Court's ruling that the Act was immaterial in a jury case in which the trial court failed to inform the jury by proper instructions that the Act imposes an absolute liability upon a manufacturer or distributor in interstate commerce of an unlabeled dangerous article, in connection with an instruction in general terms only that the petitioners were entitled to recover unless the chain of causation was broken by an intervening cause, constituted grievous error since the jury could not properly evaluate the alleged intervening cause without knowing that such violation constituted negligence per se 39

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IV. The Circuit Court's holding that petitioners were foreclosed from raising the question of error in the trial court's refusal to give any of the 20 written instructions requested by petitioners, except a portion of one of them, by the state of the record, which indicated that technically the exceptions of petitioners were made after the jury had retired, constituted a miscarriage of justice through failure to construe Rules 46 and 51, Federal Rules of Civil Procedure, together 40

V. This case presents a question of first impression, whether the Federal Food, Drug, and Cosmetic Act creates a new and independent cause of action based on failure by a manufacturer or distributor of articles in interstate commerce adequately to perform the duty of placing labels on his product or labeling so adequately to warn all foreseeable users of the potential dangers of using the product for the purposes for which it is manufactured or distributed 41

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

GEORGE T. NISHIDA and JAMES E. NISHIDA, d/b/a Hilo Dairy Company of Kauai, RYOJU SOKEI, d/b/a Sokei Dairy, and FRED L. WALDRON, LIMITED,
Petitioners,

VS.

E. I. DU PONT DE NEMOURS & COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

George T. Nishida and James E. Nishida d/b/a Hilo Dairy Company of Kauai, Ryoju Sokei, d/b/a Sokei Dairy, and Fred L. Waldron, Limited, a Hawaii corporation, pray that a writ of certiorari issue to review a decision and judgment of the Court of Appeals for the Fifth Circuit entered in the cases of

George T. Nishida and Jamse E. Nishida, doing business as Hilo Dairy Company of Kauai, a copartnership,
Ryoju Sokei, doing business as Sokei Dairy,
Fred L. Waldron, Limited,
Appellants

VS.

E. I. du Pont de Nemours & Company, a corporation,
Appellee.

OPINIONS BELOW

The order of the District Court for the Northern District of Mississippi denying appellants' motions for new trial (R. 106, 502), Appendix 13a, has not been reported. The opinion of the Court of Appeals for the Fifth Circuit (R. 558) is reported under the title *Hilo Dairy Co. of Kauai* v. *E. I. Du Pont De Nemours & Co.*, and *Nishida* v. *E. I. Du Pont De Nemours & Co.*, (Sept. 9, 1957) at 245 F. 2d (Adv. Shts. No. 4) 768, Appendix 1a, 12a.

JURISDICTION

The judgment of that Court was entered on June 20, 1957. A petition for rehearing was denied on August 16, 1957.

The jurisdiction of the United States District Court for the Northern District of Mississippi was invoked under Section 1332, Title 28, U. S. Code, June 25, 1948, c. 646, 62 Stat. 930; and under the Federal Food, Drug, and Cosmetic Act, Chapter 9, Title 21, U. S. Code, June 25, 1938, c. 675, 52 Stat. 1040, and Sec. 1331 U. S. C. A. Title 28, June 25, 1948, c. 646, 62 Stat. 930.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1), June 25, 1948, ch. 646, Sec. 1, 62 Stat. 928.

QUESTIONS PRESENTED

I

Whether or not the affirmance (R. 572) by the Fifth Circuit Court of Appeals of the judgment below based largely upon the *Ladner* decision (*E. I. du Pont de Nemours & Co.* v. *Ladner*, 221 Miss. 378, 73 So. 2d 240) had the effect of according to a State Court decision a controlling construction of a federal act, thereby violating the rule that "When a federal act condemns an

act as unlawful the extent and nature of the legal consequences of the condemnation . . . are . . . federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield." *Picking* v. *Pennsylvania R. Co.*, 3rd Cir. (1945) 151 Fed. 2d 240, 251, quoting *Sola Elec. Co.* v. *Jefferson Co.*, 317 U. S. 173, 176.

II

Whether the Circuit Court of Appeals, in holding that "Some of the instructions (R. 203-222) (Appendix 14a-29a) requested, such as those involving violations of the Federal Food, Drug and Cosmetic Act . . ., had no materiality in view of the instruction that the verdict should be for the appellants unless the chain of causation was broken", (R. 570) misinterpreted the Act and failed to give effect to the full scope and policy of that Act, which sets up the standards and policy of adequacy of warning and information required to be given to the general public and ultimate consumer through labeling and otherwise by a manufacturer of a dangerous article sold in interstate commerce, and failed to afford to petitioners the right, to which they were entitled, of having the jury pass upon the adequacy of the warning given by the respondent after it had violated the Act, in the light, not only of the cautious language, and the immediate circumstances of the handing by Armstrong to Magnolia of the letter of July 31, 1951, (Ex. 35, R. 290) but of all of the other preceding and subsequent relevant circumstances, under proper instructions as to the duty owed by the manufacturer, not only to the immediate purchaser or receiver of the product, but to the general public and ultimate consumer.

III

Whether the Fifth Circuit Court, in affirming the trial court's judgment, (R. 572) overlooked and failed to give effect to certain rights in the petitioners created by the Federal Food, Drug, and Cosmetic Act, of which they were deprived by the trial court's action in refusing to give all but a portion of one of the petitioners' requested jury instructions, in that the petitioners were entitled to have the jury know, but the jury were not informed: (1) that in shipping tri solvent in interstate commerce for use in the manufacture of feed for cattle, without labeling the same so as to warn the public that feeding the same, or at least that feeding more than a little over two (2) pounds per day per animal, might be poisonous to the cattle, the respondent had violated the Federal Food, Drug, and Cosmetic Act; (2) that such a violation constituted negligence *per se* as to any person suffering damages from products manufactured by Magnolia with respondent's solvent so shipped in interstate commerce to Magnolia; (3) that the jury had the right and duty to determine whether that negligence was the proximate cause or a concurrent and contributing proximate cause of the petitioners' damages; and (4) that, in determining whether there had been a break in that chain of causation sufficient to constitute an intervening cause exonerating respondent, the jury should consider, among other things, respondent's duties and responsibilities under the Act, not only to Magnolia which used respondent's solvent that caused the feed to be poisonous to cattle, but to the general public and ultimate consumer of Magnolia's products manufactured with that solvent.

IV

Whether, in the light of Rules 46 and 51, Federal Rules of Civil Procedure, construed together, when the trial court fails to rule on requests of a party for instructions until after the jury retires and the ruling refusing all instructions as offered is then made and is promptly excepted to by the party offering the same, such party is foreclosed from raising the question of error in such refusal on a motion for a new trial and on appeal.

V

Whether the Federal Food, Drug, and Cosmetic Act creates a new and independent federal civil cause of action based on failure by a manufacturer or distributor of articles sold or distributed in interstate commerce to adequately perform the duty of placing labels on his product or labeling so as to adequately warn all forseeable users of the potential dangers of using the product for the purposes for which it is manufactured or distributed.

STATUTES INVOLVED

Federal Food, Drug, and Cosmetic Act, June 25, 1938, c. 675, Sec. 1, 52 Stat. 1040. (Pertinent sections quoted at pages 48-50.)

Rules 46 and 51, F. R. C. P., Title 28 U. S. C. A.

STATEMENT OF CASE

The three cases constituting this petition, consolidated below for convenience of trial and on appeal, involve the recovery of damages for injuries suffered in the Territory of Hawaii by petitioners by reason of the feeding of tri-extracted soybean oil meal to cattle. At all times relevant to these actions, the petitioners (a) George T. Nishida and James E. Nishida,

doing business as the Hilo Dairy Company of Kauai, a co-partnership (Dep.* Nishida p. 9), hereinafter called Nishida, and (b) the petitioner, Ryoju Sokei, doing business as Sokei Dairy, hereinafter called Sokei, resided and owned and operated dairies on the Island of Kauai, Territory of Hawaii, hereinafter called the Territory (Deps. Nishida pp. 9, 11, Sokei p. 150). They were old customers of the other petitioner herein Fred L. Waldron, Limited, a Hawaii corporation (Dep. Waldron 457), hereinafter called Waldron, a wholesaler and retailer for many years of cattle feed (Deps. Luck 423-5; Waldron 457-8; Parker 573-4), and in December, 1951, in the case of Nishida (Dep. Nishida 14, 15), and in December, 1951 and January and February, 1952, in the case of Sokei (Dep. Sokei 154, 156, 158), purchased 300 sacks and 380 sacks, respectively, of soybean oil meal for cattle feed from Waldron, depending, as previously, exclusively on Waldron's skill and judgment, and not designating the brand or type of meal desired (Deps. Nishida 7, 88, 89, Sokei 155, 211).

This meal was shipped to Waldron in interstate commerce from the manufacturer thereof, Magnolia Soy Products Company, hereinafter called Magnolia, a Mississippi corporation from its mill at Greenville, Mississippi (Dep. Luck 426-7), and had been manufactured under the trichloroethylene extraction process. The solvent trichloroethylene, sometimes in the record and hereinafter called "tri", used in the manufacture of such meal, was manufactured and sold and delivered through interstate commerce to Magnolia by E. I. du Pont de Nemours & Company, defendant respondent, hereinafter called du Pont (R. 45, 154).

---

* NOTE: Dep. refers to the deposition of the person named, returned by the Circuit Court of Appeals to, and on file in, the trial court.

The petitioners Nishida and Sokei and the other dairymen who purchased this meal from Waldron had not known of Magnolia prior to the receipt of delivery at the designated ports in Hawaii of the original unopened sacks each having attached when received the identification tags of Magnolia and did not know of the process of manufacture used by Magnolia (Dep. Luck 446, 447); did not know that du Pont manufactured tri, had no knowledge of the use of tri in manufacturing soybean meal, and had not had any previous business relationship with du Pont (Dep. Luck 453).

The meal so purchased by them was fed by Nishida and Sokei to the milking cows and cattle on their respective dairies, with the result that many of the animals died and others became violently ill, (Deps. Nishida 25, Sokei 166).

Respondent admits the manufacture of tri and its sale and delivery through interstate commerce to Magnolia for use in manufacturing soybean oil meal for feed for cattle (R. 45).

Nishida and Sokei sued Waldron for the damages so resulting, and all three of them sued du Pont in the present cases (Dep. Waldron 458, 459, 464, 465).

In 1951 Waldron ordered for purchase 200 tons of soybean oil meal from The Brode Corporation (hereinafter called "Brode"), a Tennessee corporation in Memphis. Brode placed this order with Magnolia with instructions to ship the meal from the mill at Greenville, Mississippi, to Waldron at designated Hawaii ports (Dep. Luck 426-7, 429) and the meal received by Nishida and Sokei was part of this Waldron order. The remainder of the order was sold by Waldron to other purchasers in Hawaii for feed for cattle, who fed the same to their dairy cattle with results

similar to those experienced by Nishida and Sokei (Deps. Waldron 464-5; Luck 425-6, 435-8, 440-441, 444-5, 454; Souza 482-492; Imaizumi 494-500; Shiroma 502-8; Cambra 510-514; Shimabukuro 516-523; Hirowatari 525-9; Omori 531-4; Weight 539-542, 544-561, 565; Parker 575-585; Olim 394-406; Parker 413-416; Young 419-421).

The trial court in the forepart of its instructions to the jury said:

> "Therefore, there are to my mind, and I think in any reasonable man's mind, certain things that are definitely and specifically established by the evidence in this case. That is that du Pont did hold out to these people [Magnolia] that they could manufacture trichloroethylene extracted soy bean oil [meal] and it would be safe for cattle feed; that they did so manufacture, that in the processes of trade certain of their products marketed 'Magnolia Soybean Meal' through a broker in Memphis, a Mr. Brode, were eventually sold to Waldron, Limited, in Honolulu by Waldron, Limited, to Sokei and Hilo Dairies, and that as a result of the feeding of that meal these cattle died. I do not think any reasonable man could come to any other conclusion about that" (R. 483).

Because of the importance thereof to a proper understanding of the complexity of the three consolidated cases and of the necessity for the requested jury instructions (R. 203-222) denied by the court, we next detail, in greatly abbreviated form considering the fact that the transcript and depositions cover three consolidated cases with several thousands of pages of depositions, transcript and exhibits, the highlights of the evidence which led the trial judge to the above-quoted conclusions.

Magnolia, a Mississippi corporation having its principal office in Greenville, Mississippi, was incorporated in January, 1951, organized Feb. 7, 1951 (R. 255), and from March 1951 until sometime in January 1952 (R. 292) was engaged in producing soybean oil and soybean oil meal by a chemical extraction process, using tri as the solvent, and selling the meal for cattle feed.

L. L. Ford, Lyman Reed and J. M. Warren (hereinafter called, respectively Ford, Reed and Warren) are and since Magnolia's incorporation have been the owners of its capital stock and its officers and directors. Prior to January 23, 1951, they were partners doing business as L. L. Ford Associates (R. 255, 262, 268, 298, 303, 305, 332, 333).

In June or July, 1950, Ford Associates began construction at Greenville (R. 255) of a soybean oil mill for producing oil and meal by the process and for the purposes above stated. The mill and certain real estate and other property valued at approximately $500,000.00 were conveyed in February, 1951 to Magnolia (R 288-9). The mill started production about March 15, 1951 and continued with certain interruptions until January 10, 1952 (R. 276, 292, 294). About that date it was closed and thereafter dismantled.

During 1949 and for several years prior, L. L. Ford engaged in the business of designing and building solvent extraction plants (R. 284). He had up to the time of the construction of the Magnolia plant dealt with equipment designed principally for use in manufacturing soybean oil and meal, with the petroleum product known as hexane, a volatile extraction solvent. By Iowa State College he was referred to du Pont for information on the properties of trichloroethylene, a chemical solvent manufactured by du Pont for processing soy-

beans (R. 284). Du Pont claimed trichloroethylene to be non-inflammable, or almost so, therefore less hazardous than hexane and a safe solvent for the processing of soybean meal for feed for cattle (R. 311, 317). As a result of his inquiry he met early in 1950, T. J. Milligan, an agent of du Pont who told Ford of his Company's interest in developing mills larger than those theretofore constructed for the use of trichloroethylene. On this point Ford testified:

> "Mr. Milligan told me that if I built a mill that would use trichloroethylene that the du Pont Company would furnish me any assistance in engineering, developing and designing possible for them to offer me and they did * * *. Mr. Milligan paid me a visit on at least two occasions in Atlanta." (R. 285).

Correspondence and further conversations developed between T. J. Milligan, representing du Pont on the one side, and L. L. Ford, Ford Associates, Lyman Reed and the Davidson-Kennedy Company, on the other (R. 272, 276).

The last mentioned was represented by Allen Jackson and O. H. Sale. Allen Jackson, through his company, had worked with Ford in designing and manufacturing extraction equipment and Davidson-Kennedy did make most of the machinery and other items for the Magnolia plants. The extent of the interest of du Pont in the construction of a large mill (R. 284) by L. L. Ford Associates, the aid provided and the high degree of supervision given by du Pont are established by 20 exhibits, some with numerous attachments, Nos. 20 to 48, both inclusive.

Exhibit 20, letter of du Pont's T. J. Milligan of August 11, 1950, with its enclosures, addressed to L. L.

Ford is of vital importance for on the representations made in the letter and in the appendix enclosed therewith the decision was made by L. L. Ford and his associates to proceed with the construction of the plant for use of trichloroethylene as an extraction agent.

On or about August 8, 1950 (R. 272) T. J. Milligan was at Greenville, Mississippi, and in a conversation there held with L. L. Ford, minimized and brushed aside questions asked him concerning statements received by Ford and J. M. Warren about the toxicity of trichloroethylene extracted meal. Ford testified with respect to the conversation that he, Ford, said, "I told him [Milligan] that we were at a point at the time to where we could back up, that we had not gotten so far that we could not convert [meaning that at that time the plant was convertable into one using an extraction agent other than trichloroethylene]. He told us there was nothing to the rumors we'd heard and I asked him to give me a letter to that effect. * * * I told him what had been said about it and Mr. Milligan told me it was all rumors and there was nothing to it. * * *, nothing to any information we had that soybean meal made with trichloroethylene was toxic, that was strictly rumor and there was nothing to it. He said they had investigated and offered this product in some of their trade papers and they wouldn't recommend it unless it was all right. I asked him for a letter to that effect and along with those other things he read this letter." (R. 296, 297-298).

As a result of the conversation T. J. Milligan did write under date of August 11, 1950, Exhibit No. 20, saying in part: "Several times you have mentioned that certain parties in the south are conducting a 'smear campaign' maligning the quality of tri-

extracted soybean meal and oil and casting doubts on the stability of trichloroethylene. We feel that you should know the true facts about several instances in the history of tri-extraction which have become distorted as news of these occurrences passed from person to person in the oilseed industry. Accordingly, we are enclosing a brief discussion of tri-extracted oil and meal quality which also outlines our experience with corrosion in tri-extraction plans. This background should enable you to satisfactorily answer any questions that may arise as a result of the disparaging reports that are now being circulated." Two paragraphs in the appendix of August 11, 1950, a part of Exhibit 20, are significant:

> "It has recently been brought to our attention that an unidentified hemorrhagic cattle disease, having symptoms virtually identical to those described in the Stockman and Cornell reports, has been encountered among cows in both Iowa and Colorado. Feeding practice on the farms where the disease has been encountered was investigated as a possible clue to the cause and, as might be expected, varied widely from farm to farm. Some of the affected animals had been on grass, without supplemental rations, for 45 days prior to onset of symptoms. Others were receiving soybean meal plus hay, with or without supplemental minerals and vitamins added. On farms where soybean meal was employed, some were feeding expeller or hexane-extracted meal, others were feeding trichlorothylene extracted meal. There is, of course, the possibility that all animals reported suffering from this hemorrhagic condition did not actually have the same disease; however, we have been told that the symptoms appear identical.
>
> An important feature of the occurrence of the disease in Iowa and Colorado is the fact that in

several cases a single meal shipment was divided among a number of farms with the disease occurring on only one. On the farm where the disease occurred, however, several animals were lost. This is one of the chief factors which has led the soybean processors, veterinarians, and university veterinary faculties with whom we have discussed these cases to conclude that the soybean meal was probably not the cause of the disease."

Also enclosed with the letter of August 11, 1950 of T. J. Milligan, (Ex. 20) was a mimeographed copy of a document entitled "Trichloroethylene Soybean Extraction", dated December 27, 1949. At page 9 we find set out in the entitled copy:

"Today, trichlorethylene is plentiful and will remain so. *The du Pont Company, with its faith in the process is actively promoting its use.* (Emphasis supplied.) We are happy to say that within the past six months a number of 25 to 50-tons capacity trichlorethylene plants have been contracted for, and we believe that we will be able to report in the not too distant future that one or more plants with an individual capacity of 100 tons or more have been placed under construction."

And at page 11:

"In considering this process, we also respectfully suggest that a company with the national prominence and reputation of E. I. du Pont de Nemours and Company, Inc. can scarcely risk recommending a process such as trichlorethylene extraction unless we are absolutely convinced as to the quality and marketability of the product that it will produce and the cost at which it will operate." (Emphasis supplied.)

A copy of the Stockman Report (Stockman, Sir Stewart), Jour. Compar. Path. and Ther., 29 (1916), No. 2 pp. 95-107, as extracted in Exp. Sta. Rec. 36 (1917) p. 580 was enclosed in the letter of Milligan of August 11, 1950, Exhibit 20, and Milligan stated with regard to the report that it "actually showed that trichloroethylene itself was not the poisonous substance affecting the cattle," and other experiments "failed to reveal the cause of the disorder" in cattle. In fact, the Stockman Report recommends against the feeding of trichloroethylene meal to cattle. It is well to quote what Dr. Vollertsen wrote in the Cornell Report with regard to the Stockman Report:

> "In the spring of 1916 there occurred in the south of Scotland cases of poisoning among cattle fed concentrate containing trichloroethylene extracted soya bean meal. Of sixty-seven cows showing symptoms of poisoning fifty-four died. This number represented 10% of the total number of animals receiving the ration and the distribution was on nine farms. The average time from beginning of feeding to onset of symptoms was sixty-four days. The average amount of soya bean meal consumed was 194 pounds per cow.
>
> The symptoms consisted of high temperature, 105° F. to 109° F., refusal to eat, bleeding from nostrils, colic, intestinal hemorrhage and diarrhea, lessening and cessation of lactation.
>
> Autopsy disclosed pin point to massive hemorrhage throughout the subcutaneous tissues and muscles, especially the hind quarter, the mucous membrane of the gastro-intestinal tract with marked ulceration of the small intestine, peritonitis but little evidence of damage to the other organs.
>
> Stockman in his investigation and experimental studies concluded that tricloroethylene when fed

in comparatively large doses, one to three ounces daily for a long period was not poisonous, and that a vitamin deficiency did not exist. When soya bean meal is extracted with trichloroethylene, a poisonous substance is formed and therefore this method of extraction should be discontinued."

The Cornell Report mentioned above as enclosed by T. J. Milligan to L. L. Ford was an experiment conducted at Cornell University in 1937 and 1939. The record shows that du Pont defrayed the cost of the experiment and it was conducted under the direction of Dr. Vollertsen, an employee of du Pont. On the basis of that report du Pont set out in the mentioned appendix that quality soybean meal could be produced if the meal were heated to 120 degrees centigrade. We know from the testimony of Dr. Raymond T. Vaughn, set out in part, post, pages 33-34, that the degree of heat is a factor only to the extent that the higher the temperature the more quickly the reaction, forming the poisonous substance from trichloroethylene and soybeans, takes place.

The Cornell Report at page 5 shows that the trichloroethylene processed meal used in the experiment was fed to one group of cows at the rate of 1.4 to 2.7 pounds per day for a year to each animal and that with another group (at page 6 of the report), "The year's intake of trichloroethylene extracted soybean meal ranged from 539 to 755 pounds or 1.5 to 2 pounds per day.", by each animal.

We find also in the appendix (Ex. 20) the statement, *supra* p. 12, respecting the outbreak in Iowa and Colorado, the outbreak brought out by Ford during the heretofore described conversation of August 8, 1950 between T. J. Milligan and L. L. Ford. Here again we

see du Pont, through its representation, making light of an outbreak of the hemorrhagic disease, writing that a single shipment of meal was divided among several farms with the hemorrhagic disease occurring on only one, and concluding, "This is one of the chief factors which has led the soybean processors, veterinarians, and university veterinary faculties with whom we have discussed these cases to conclude that the soybean meal was probably not the cause of the disease." *Supra*, p. 13.

With his letter of October 21, 1949, Ex. 28, to Lyman Reed, T. J. Milligan enclosed a copy of the Cornell Report which he said, "I am certain will answer some of the questions in your mind, and also refute some of the behind-the-hand whispering you may have heard."

Du Pont's representatives visiting the plant at Greenville were, in addition to T. J. Milligan and R. Stuart Armstrong, Mr. F. G. Low (referred to in the record as F. G. Loweron), Mr. Hamilton and Mr. Schwartz (R. 275). These representatives, according to L. L. Ford, had sketches, bulletins, specifications, etc. and supervised the installation of equipment. The construction and operation of the plant and the directions of du Pont in this regard were carried out by Magnolia officers "as nearly as possible directly to the letter" (R. 275). Not only were the technical bulletins, charts, etc. enclosed with the letter of August 11, 1950, Exhibit 20, sent to L. L. Ford, they were also sent to Davidson-Kennedy to assist that Company (R. 276) in manufacturing the equipment for the Magnolia plant and that Company fully carried out du Pont's directions. During the entire operation of the Magnolia plant all trichloroethylene used was purchased exclusively from du Pont (R. 277).

The matter of directions and warnings are of such outstanding importance it is necessary to further quote from the testimony of L. L. Ford:

In reply to the question, "State whether or not Magnolia Soy Products Company in the operation of its plant at Greenville, Mississippi, which manufactured soybean meal by the tri-solvent process, whether in the operation of that plant you followed the directions given by du Pont for the operation of your plant?"

L. L. Ford answered, "Right to the letter" (R. 303).

On August 3, 1951, R. Stuart Armstrong delivered to Lyman Reed and L. L. Ford the letter of C. B. Shepherd of July 31, 1951, Ex. 35, (R. 283, 402). It is this letter that du Pont contended constituted a sufficient warning to Magnolia to make no further sales of tricholoroethylene processed meal for feed for cattle. Relative to the conversation which took place on the delivery of that letter the testimony of Ford is:

"I read the letter [C. B. Shepherd, July 31, 1951, Ex. 35] (R. 288) and became very much disturbed. I told Mr. Armstrong, here you've let me spend $500,000.00 building this mill and now you tell us we can't use it to manufacture feed, and he said, the reason I brought it personally was because I didn't want you to get excited about it. I told him 90% of our business is cattle feed and we can't sell a car a year other than for cattle feed and now you tell us not to sell any more for cattle feed, and he said, 'I didn't say that', * * *." Anyway, I asked him, does the Du Pont Company know we can't operate our mill and have built one here that cost $500,000.00? If we can't sell it for cattle feed we can't operate it. Did Du Pont tell us to shut down? Do they have evidence?" To this Armstrong replied:

"No, there isn't any evidence conclusive; there's rumors circulated from time to time. All through these letters they dispelled those rumors and said there wasn't anything to them" (R. 289).

At this point the plaintiffs introduced Exhibit No. 35, the mentioned letter of July 31, 1951 of C. B. Shepherd (R. 290).

L. L. Ford's testimony continues on this subject. "We took the position they knew what they were talking about. We had the mill closed down at the moment and later in the year we ordered from the Du Pont Company a shipment of trichloroethylene to extract oil from soybeans to be used for cow feed. I told Mr. Armstrong that we couldn't operate unless we did sell it for cow feed, and he knew it was going to be used for that. I will give you the date, November 21, 1951. The Du Pont Company drew a draft on my Company for $3718.00 for 52 drums. * * *. They did not anywhere on the invoice or accompanying letter in any way say this could not be used as they recommended it all of the time during the years past" (R. 291, 292).

In further reference as to what took place at the time of delivery on August 3, 1951, of the mentioned letter of July 31st, Ford referring to Armstrong said, "He expressed the opinion so far as he knew there wasn't any evidence that trichloroethylene meal had anything to do with cattle losses" (R. 293). To the following question, "When you told him you couldn't operate your plant without selling your feed for cattle food, what did he say to you at that time?" Ford answered, "I asked him point blank if Du Pont would recommend our closing the plant down because we

couldn't sell it for cow feed and he said they did not" (R. 293-294).

In reply to the question whether or not any warning had been received from Du Pont after the delivery of the letter of July 31st, he, Ford, said, "I didn't receive a warning from the Du Pont Company but I received a warning from the State Plant Board on January 10, 1952." When asked in particular whether he had received warnings in October and November, 1951, from Du Pont as to whether or not the trichloroethylene processed meal was toxic he answered, "I did not" (R. 294).

In weighing the testimony of R. Stuart Armstrong, consideration must be given to the absence at the trial of L. L. Ford, a fact known to Armstrong. During the trial of the case, *Frank L. Ladner* v. *du Pont*, Circuit Court, Pearl River County, Mississippi, Reversed, *du Pont* v. *Ladner* (1954) 221 Miss. 378, 73 So. 2d 240. L. L. Ford was present and testified on behalf of the plaintiff. R. Stuart Armstrong was also a witness at the trial, testifying for the defendant du Pont.

Several months prior to November, 1955, and at all times since, L. L. Ford has been out of the United States. To avoid delay and permit trial at the November Term 1955 of the instant cases, it was stipulated that the testimony of L. L. Ford given at the trial of the *Ladner* case would be accepted as Ford's deposition and as such admitted in evidence (R. 253, 254). The *Ladner* case involved the recovery of damages for the loss of dairy cows fed soybean meal manufactured by Magnolia through the trichloroethylene process.

Du Pont had a copy of the transcript of all of the testimony in that case and Armstrong had the oppor-

tunity of reviewing the testimony of L. L. Ford and his own testimony at that trial prior to appearing as a witness on behalf of the defendant in the cases below (R. 431-432).

Having quoted at some length the testimony of L. L. Ford concerning the conversation he had with R. Stuart Armstrong at Greenville on August 3, 1951, the occasion of the delivery of the letter of C. B. Shepherd of July 31, 1951, Exhibit 35, it is appropriate to quote the direct testimony of Armstrong on this point and in part his cross-examination:

Direct examination: (R. 404-408).

Q. Now when you delivered that letter to Mr. Reed and Mr. Ford, what was said by any and all of you at that time?

A. Well, at the time I delivered this letter, their plant was shut down, they were not using the solvent plant. They had no suitable beans. They had heard of these outbreaks in the North, and they were very much concerned over this letter, because as they stated to me, they were in bad financial shape, and they had planned to sell their plant, but with this letter, plus the recommendation in this letter, plus the information coming down from the North on those disease outbreaks, they didn't think their chances of selling the plant would be very good. They felt it would be difficult to sell it.

They also advised that in line with Mr. Shepherd's suggestions, that should they resume operations, they would investigate the possibility of selling this meal to swine and poultry raisers, to be used as feed for those animals, as outlined in the letter.

Q. Now tell us whether or not there was any instruction given you by Mr. Shepherd, other than the ones you told us about a moment ago, were those all the instructions given you by Mr. Shepherd?

A. Yes, yes, sir.

Q. Now Mr. Armstrong, there has been testified in this case through Mr. Ford, by his deposition, that on the occasion of the delivery of this letter of July 31, 1951, that Mr. Ford said that he told you, "Here you have let us spend $500,000.00 building this mill, and now you tell us we can't use it to manufacture feed." Did Mr. Ford make such a statement to you?

A. No, no.

Q. Did he make any statement that might be reasonably interpreted to be the same or similar to that?

A. No, I don't recall it.

Q. And it has been further testified by Mr. Ford in that same deposition, that you then said "The reason I brought it to you personally, was because I didn't want you to get excited about it." Did you make such a statement?

A. No, I didn't.

Q. Did you make a statement that might be reasonably interpreted as being similar to it or equivalent to it?

A. No, I am sure I didn't. I wanted him to be concerned about that letter.

Q. Now, Mr. Armstrong, Mr. Ford, in that same deposition, further testified that, "90 per cent of our business is cattle feed, and we can't sell a car a year other than for cattle feed, and now you tell us not to sell any more for cattle feed", and that you replied, "I didn't say that."

Q. Did you make that statement attributed to you by Mr. Ford, that "I didn't say that?"

A. No, sir.

Q. Or anyone that is equivalent to it or similar to it?

A. No, sir, I am sure I didn't.

Q. Did Mr. Ford make any statement as stated that "90 per cent of our business is cattle feed, and we can't sell a car a year other than for cattle feed, and now you tell us we can't do that?"

A. No, I don't recall any such statement.

Q. Or any statement similar to that, or which might be reasonably construed to be the same as the one I have just read?

A. No. They weren't operating at that time. They didn't think they would be.

Q. And why were they not operating, what was the trouble there?

A. Well, they had run out of beans, and their credit was bad, and they couldn't buy more beans at that time.

Q. And Mr. Ford, in his same deposition, has further said or testified that he asked you: "Does the du Pont Company know we can't operate our mill, and have built one here that cost us $500,000.00, if we can't sell it for cattle feed, we can't operate it." Did he say that?

A. No, sir.

Q. Did he further say, "Does Du Pont tell us to shut it down, do they have any evidence", was that said by Mr. Ford on that occasion, Mr. Armstrong?

A. No.

Q. Or any other statement by Mr. Ford that might be construed to be the same or equivalent, and did Mr. Ford make any such statement?

A. No, he did not. They indicated that they were going to look into the possibility of selling it to the poultry and swine outlet.

Q. Now Mr. Ford further said in his deposition, "that you then told him, No, there isn't any evidence conclusive, there are rumors circulating from time to time." I'll ask you whether or not you made that statement or any wording similar to that statement?

A. I absolutely did not.

Q. Mr. Ford in the testimony of that deposition further has testified that he told you at that time that, "We couldn't operate unless we did sell it for cow feed", and that you, Mr. Armstrong, knew it was going to be used for that purpose, and that is with reference to the 23rd of November, 1951, sale. [Sale of trichloroethylene by du Pont to Magnolia November 23rd, 1951—approximately four months after the letter of July 31, 1951, Exhibit 35].

Did Mr. Ford make that statement, or did you make that answer?

A. No, sir, not at all.

Q. Did you know or have any idea it was going to be used for cow feed?

A. I did not. I had no idea whatsoever that it was.

Q. And did Mr. Ford make the statement that you knew it was going to be sold for cattle feed?

A. No, not to me.

Q. And that he told you, "He couldn't sell it", or I will read his exact words, "I told Mr. Armstrong that we could not operate unless we did sell it for cow feed"; Mr. Armstrong did Mr. Ford make that statement to you?

A. No.

Q. Or words that might be either said to be the same as that statement?

A. No, sir, I'm sure he didn't.

Q. Now, on the occasion,—on this same occasion when the letter was delivered, Mr. Ford testified that

you, Mr. Armstrong, expressed the opinion that so far as you knew there was not any evidence that trichloroethylene extracted meal had any thing to do with the cattle losses, and I'll ask you did you make that statement?

A. No, we didn't,—I didn't. We did not detract from that letter of Mr. Shepherd.

Q. Now Mr. Armstrong, did Mr. Ford ask you this question: "I asked him point blank if Du Pont would recommend our closing the plant down because we couldn't sell it for cow feed", and it is said by him that you said, "They did not". Did Mr. Ford make that statement, and did you make that answer, Mr. Armstrong?

A. No, sir.

Q. Or words similar to that or equivalent to it?

A. No.

Further, concerning the mentioned conversation of August 3, 1951, the witness testified on cross-examination as follows:

Q. What did you say about the Minnesota experiment? (R. 427).

A. I told them that the——

Q. Now, I am asking you what you said about it?

A. I told them that "experiments are in progress."

Q. That is all you said?

A. And I said "We hope they will shed some light on the situation."

Q. You just told them that experiments were in progress?

A. Yes, sir, and that nothing definite had yet been determined.

Q. Nothing specific had been determined?

A. No.

Q. He [L. L. Ford] was present at the trial of the case of Ladner v. du Pont at Poplarville, Mississippi, was he not? (R. 431 et seq.)

A. He was a witness there, yes, sir.

Q. And he testified as a witness in that case, didn't he?

A. Yes, sir.

Q. Mr. Ford is not in Greenville today, is he, Mr. Armstrong?

A. I don't know about that. I haven't seen him.

Q. Don't you know that Mr. Ford left several weeks ago for Iran?

A. By hearsay. I heard that. I couldn't know it.

Q. Now you also know that the testimony of Mr. Ford by deposition was admitted in evidence in this case, that is, the testimony of Mr. Ford in the Ladner v. Du Pont case, was admitted in evidence under stipulation of counsel in this case, do you know that, Mr. Armstrong?

A. Yes, sir.

Q. Why did you not in the Ladner v. Du Pont case, deny the statements made by Mr. Ford when he testified as a witness in that case?

A. I didn't know what Mr. Ford testified to in that case until I read the transcript of the trial.

Q. Well, you didn't deny any statements he made, did you?

A. I didn't know what he stated in that case.

Q. Did you deny any statement that he made?

A. I didn't know what statements he made, so I couldn't deny them.

Q. Do you know whether you denied them or not, you know that, don't you?

A. I denied them here today.

Q. Did you deny them there at that time?

A. At that time, I didn't know what he said. I was out waiting in an outside room, like I have been here today. I don't know what Mr. Ford stated.

Q. You just read your testimony, have you not?

A. Yeah, I've read my testimony here about this conversation.

Q. Well, you just read it when I gave it to you a few moments ago, isn't that right?

A. Yes.

Q. And that testimony doesn't contain any denial on your part of any statement made by Mr. Ford, relative to that conversation at the time of the delivery of the letter of July 31, on August 3, 1951, does it?

A. You are asking me that now?

Q. I'm asking you that now.

A. As of my knowledge today, I am sure I denied them.

Q. Well, according to that transcript, you didn't deny a statement made by Mr. Ford in the Ladner v. Du Pont case, of the conversations that were held with you on August 3, 1951?

A. If you will give me that transcript again, I'll look at it. I can't read it all at once.

Q. Very well, here it is.

A. Can you show me what Mr. Ford's testimony was to compare against this that you are asking me, if I denied anything that he said; is that what you are asking?

Q. The question is very simple, Mr. Armstrong.

A. Not to me.

Q. I asked you if that testimony contained any denial by you of any statement made by Mr. Ford concerning that converstation at the time of the delivery of this letter on August 3?

A. This testimony that I have here?

Q. Yes, that testimony that you have there. Do you see anywhere in it where you denied anything Mr. Ford has said?

A. No, I don't

Q. Then there is no denial there?

A. No, not at that time.

The death of cattle in Minnesota in 1951 and the research at the University of Minnesota during that year, play an important part in whether du Pont gave that degree or type of warning required by law, whether it withheld information that should have been disclosed.

The witness (R. Stuart Armstrong) testified that he first went to the University of Minnesota the latter part of May or early in June, that he knew of no communications with the University prior to his visit, and that he first learned of the research by the University at the time conferences were held with other concerns for formulating a program for research and that the conference was held about the time of his mentioned visit, that outbreaks occurring in Minnesota in January, 1951 were the reason for the mentioned conferences, and that he knew generally some 41 calves and cows fed trichloroethylene processed soybean meal had died (R. 422).

With respect to whether reports had been received from the University of Minnesota concerning the research being carried on although the witness was indefinite, he did testify, "I am sure they must have but I couldn't give you, say, as of a certain date, that we did receive one, but I'm sure we must have. They must have because we were helping support the research" (R. 424). And in reply to the question, "Did you ever see any reports?" he said, "Yes, I did.", (R. 424) and he admitted reading the articles by Drs. Twichans

and Lessure on their experiments conducted at the University of Minnesota in the spring of 1951. The article discloses that one of two calves, used in the experiment, fed trichloroethylene soybean meal, died July 9, 1951. The article was published in October, 1951, and read by the witness in November, 1951 (R. 426). The record shows with respect to this witness that he wrote no letters nor forwarded copies of any reports concerning the Minnesota experiment and the outbreak in that state to Magnolia or anyone connected with it at any time either prior to the date of delivery of the letter of C. B. Shepherd, of July 31, 1951, or during the remainder of that year (R. 436, 437).

On this point to be specific R. Stuart Armstrong was asked, "Did you or the defendant send copies of any reports received at any time from the University of Minnesota on the work done there to Magnolia Soy Products Company or any of its officers * * *?," (R. 436) and he answered as stated in the paragraph immediately above.

The occurrences in Minnesota were known to Armstrong on August 3, 1951 yet he made no mention of them on that date to Ford or Reed.

There is no evidence that du Pont, by label, labeling or through any media, public or otherwise, warned the petitioners or the general public of the dangerously harmful effect of feeding the trichloroethylene extracted meal to cattle, a duty it was required to carry out under the Federal Food, Drug, and Cosmetic Act.

Referring again to the conversation that took place at Greenville, Mississippi, on August 3, 1951, the rec-

ords further show the only specific statement made by Armstrong is that the Minnesota experiment was in progress, it was hoped that the experiment would shed some light on the results of feeding trichloroethylene-processed meal on the health of cattle and as of the time he was speaking nothing definite had been determined. This witness also said that he did not know if labels were on the drums of trichloroethylene shipped to Magnolia (R. 438) and with regard to recommending or suggesting to Magnolia that it place labels on the bags in which it shipped meal, no instructions, not even a suggestion had been made at any time before or after delivery of the letter of July 31, 1951, Exhibit 35, that Magnolia label its product, the label stating in effect that the meal was not to be used for feed for cattle (R. 438, 439).

Dr. Robert A. Woodberry, du Pont's expert witness when questioned on direct examination on the uses of trichloroethylene replied: "Yes, I know it is used industrially, in industrial fields, but because of its toxic effects, as is true of all drugs, why I know that it is not used for cow feed or other animals of like nature, because their use of it would be dangerous." Typewritten copy of transcript on file with the Court of Appeals.

Mr. C. B. Shepherd, witness below for du Pont, is the manager of that Company's Chlorine Products Division (R. 443). T. J. Milligan (R. 462) and his successor, R. Stuart Armstrong, were for all times herein pertinent, under his supervision. Each reported to him. Du Pont gave what it termed, "Technical Sales Service" to its customers (R. 445). Relative to the service rendered Shepherd testified: "We spend full time work with them on design of equipment and teaching them as to the use of the solvent, and stay until we feel

that they would be sufficiently informed to where they could carry on the operation and until they would be competitive. Now also on the equipment companies, that manufacture equipment which will be put to use handling our solvent, using it for extracting various products, we stay with those people and give them every direct help that we can toward the use of the technical company's equipment, and we give those technical companies who manufacture the equipment everything that we know about it and when we leave, why the companies require no further service." (R. 446).

The witness continued in reply to further questions:

"Why, we get requests of that kind all the time, many times, and we have probably spent thousands of dollars of information, engineering, chemical information, and information on physical properties of our solvent, that no individual company interested in the use could possibly obtain for themselves, so naturally they call on us for that information." (R. 447). And he admits that Magnolia received technical assistance in the design of their solvent recovery equipment, and in the initial operation of that equipment (R. 447).

It is obvious that if the individual company could not obtain for itself chemical information and information on the physical properties of trichloroethylene that dairymen and wholesale feed dealers could not.

This witness, then employed by du Pont, first knew of the hemorrhagic disease in 1939, although du Pont had been manufacturing trichloroethylene since 1930, knew of reports from Stockman and some German authorities on hemorrhagic disease in Scotland, in Germany and in the Low Countries (R. 448). (Ante, p.

14) He further testified du Pont initiated tests at Cornell University to determine whether trichloroethylene was connected with the hemorrhagic disease in cattle, the experiment extended from 1937 to 1939 (R. 449). The results were written by Dr. Vollertsen, an employee of du Pont. His paper is known and referred to in the testimony and in this brief as the Vollertsen or Cornell Report. These reports are briefly described in the testimony of Ford as to T. J. Milligan's activities and letters, ante pages 10-14. In 1950 du Pont received reports from Iowa and Colorado of deaths of some 150 cows, 20 of which had been fed trichloroethylene (R. 450). These outbreaks are mentioned under the testimony of L. L. Ford in connection with conversations had with T. J. Milligan and letters received by Ford from him. These outbreaks are what were referred to by Milligan as "mere rumors." Du Pont claims after the outbreak in 1950 in Colorado and Iowa it had no further complaints on the use of trichloroethylene processed meal until the outbreak of 1951 in Minnesota. The action taken is set out under the testimony of R. Stuart Armstrong.

After the experiment at Cornell University, commenced in 1937 and completed in 1939, du Pont conducted no further experiments on the feeding of the tri-processed soybean meal to cattle (R. 467). It did, as has been stated, contribute in June or July, 1951, to the experiment at the University of Minnesota, but the results of the experiment were not made known to Magnolia.

Iowa State College University experimented in the field for some fifteen years. The witness indicated the work there was mainly with equipment. He admitted Iowa had conducted some experiments but in his opin-

ion they were not what he termed "a controlled experiment" (R. 468).

With regard to the outbreak in Minnesota the witness further admitted he first heard of it in March or early April, 1951, (R. 469) that he knew of the deaths in Minnesota by April 26, 1951 of 41 cows and calves that had been fed tri-processed meal, although he did not recall the exact number (R. 469). He knew that out of 30 cattle in the Glencoe, Minnesota area some 22 died by the end of June, 1951 (R. 469). This witness said in reply to the question, whether du Pont had received reports from the University of Minnesota, "We were in constant touch either by letter or personal visits with the University of Minnesota", (R. 470) and stated that no copy of a report received was ever sent to Magnolia or any of its officers and further, that no copy of a report on the Iowa and Colorado outbreaks had ever been sent to them (R. 470, 471). The record shows du Pont received a report from the University of Minnesota on an experiment in which the cattle under experiment were divided into five groups, that all the cattle in group 3 died (R. 477). These were trichloroethylene-processed fed cattle. No copy of the report was sent to Magnolia. This highly important informatoin was not conveyed to Magnolia. Not to do so is a dereliction of duty, a violation of the duty imposed as will hereinafter be shown not only by statute but also under the common law.

Whether products are properly labeled as required by law, as heretofore stated, is of great importance in this case.

Mr. Shepherd, although head of the Chlorine Products Division, did not know if drums containing the product tri manufactured under his division, and shipped through interstate commerce were labeled. This statement he had made with regard to drums shipped to Magnolia prior to the date of delivery of his letter of July 31, 1951, as well as thereafter (R. 472, 473).

The court's attention is directed to the admission of this witness, C. B. Shepherd, that of the eight companies manufacturing tri for processing soybean meal for cattle during 1951, only one was doing so at the end of that year (R. 462). This is conclusive proof of the highly inherently dangerous properties of the trichloroethylene when used as the extracting solvent in manufacturing soybean meal.

The only testimony of du Pont's witness, Frank L. McDonald, relevant to the issue or material to this appeal is that trichloroethylene was received by Magnolia from du Pont in drums with no label other than "that it was trichloroethylene" and "That's the only thing I ever saw in the way of label on those drums" (R. 390).

Petitioners called Dr. Raymond T. Vaughn, Professor of Chemistry and Head of the Chemical Department at Southeastern College, Memphis, Tennessee, and Director of Research and Consulting Service with the Barrow Agee Laboratories in Memphis, as their expert witness (R. 337).

Dr. Vaughn expressed the opinion that while trichloroethylene in quantities of one to three ounces

daily is not toxic to cattle and raw soybeans are not. "that in the processing of soybean meal by the trichloroethylene extraction procedure that a toxic material, which is poisonous to cattle is produced" (R. 340). There is no evidence refuting or even qualifying the opinion. This witness also testified that the higher the temperature under which the meal was processed the greater was the quantity of reacting material produced in a given quantity of time (R. 341, 351).

He expressed the view that a chemist would know the properties of trichloroethylene and soybean and would know that those properties when combined under heat would produce a substance poisonous and toxic to cattle. This witness further said that trichloroethylene is listed as a drug in the United States Pharmacopeia (R. 344). On redirect-examination, Dr. Vaughn stated in reply to the question, "Now Doctor, your testimony in this case, your opinions have been based on your knowledge, and in what field, the toxicology field or the chemistry, or what field." The answer is "They have been based on my knowledge of trichloroethylene and the materials that occur in soybean meal. I don't think this would be very difficult at all for a chemist to see that you produce toxic material from those two" (R. 356).

From the last statement the conclusion to be drawn is clear that any qualified chemist would know that soybeans and trichloroethylene when heated together produce a poison yet du Pont's chemist apparently did not know this simple fact which it should have known and under the law is charged with knowing.

Throughout the trial du Pont attempted to prove negligence on the part of Magnolia in that Magnolia allegedly failed to maintain the meal at proper temperature during the extraction process, that is a heat of 240° F. Dr. Vaughn's uncontradicted testimony established the immateriality of such a theory. With so little knowledge of the properties of soybeans and of its own products trichloroethylene, du Pont advertised and sold trichloroethylene as a safe extraction solvent and did so without a label, without directions and without warning of the harmful potentialities of such meal to cattle. Should it be admitted for purpose of argument that Magnolia was negligent in manufacturing this would not relieve, as is hereinafter shown, du Pont from liability.

After Dr. Vaughn testified the plaintiffs rested and du Pont moved for a verdict. In denying the motion the court dictated for the record a statement of which the following is a part: "there is a question in this case which I think would be a question for the jury, as to whether or not du Pont sufficiently gave warning to the Magnolia Soy Products Company, that this theory had been found full of errors, and that there was danger in this feeding. That, I think, is for the jury, and if it may become a question for the jury, I do not think it would be at this stage, but it may become a question for the jury as to whether the chemical trichloroethylene was the toxic cause of the deaths of these cattle, but in this view du Pont, having knowingly furnished this chemical for this use, knowing that it would go into the processes of making soybean meal,

and their theory about the matter, however sincere and honest they may have been in it, proving to have been false, that is a jury issue, and the motion for a directed verdict would be overruled" (R. 358).

While some of the following facts do not appear in the record, it is vital to an understanding of the situation in which the trial judge placed counsel to call them to the attention of this Court.

On November 29, 1955, the last day of trial, shortly after court convened that forenoon, counsel for the plaintiffs, petitioners here, and for the defendant were called by the Judge into chambers. Petitioners brought out that they had for presentation to and consideration by the court a number of written instructions. The court asked if there were an instruction on intervening cause. Petitioners' Instruction No. 10 [R. 214] was presented and after reading it the court called for authority on the use of the words "highly extraordinary". Authorities were submitted sustaining the use of the word "highly" yet the court deleted the word and on doing so immediately proceeded to the bench. No opportunity was given by the court to present the remaining instructions. In fact, with the exception of Instruction No. 10, the court did not at that time read them. That part of Instruction No. 10 adopted by the court is set out in the Appendix hereto at page 23a.

Immediately upon taking the bench the court commenced charging the jury. Roger E. Brooks and C. Nils Tavares, of counsel, were not present in court at the beginning of the charge. William G. Burgin, Jr., of counsel, came to the judge's chambers and made the

statement, "The judge is charging the jury.", and counsel in chambers immediately entered the court room.

On conclusion of the charge, the court asked if there were objections. At that time there had been no ruling on the requested written instructions and the only statement then made was an exception by C. Nils Tavares of counsel for appellants, in these words, "For the record, Your Honor, may we most respectfully raise the question of law by excepting to the court's ruling, ruling out possible prospective profits?" The court responded, "Yes, sir, you may do that."

After the jury retired the court made this statement, "Mr. Reporter, take this into the record. There were presented to the court in this case a number of instructions requesting for the plaintiffs and for the defendant which the court will hand to you and which shall be marked as 'Proposed Instructions' in this case.

"The court has considered these instructions and while quite a number of them are correct theoretical statements of law, the court did not give these instructions because of the fact that under the very limited factual situation which the court found existed in this case, the court was of the opinion and still is of the opinion that the jury would get a more intelligent idea of the issue on which they had to pass than it would have if the court had read certain of the requests to charge couched in more or less legalistic language" (R. 499).

It is pointed out that the court, as stated, gave no opportunity to be heard on instructions prior to the charge, that the court instructed the jury prior to ar-

gument by counsel, and that it was not until after the jury had retired that the court made the above-quoted statement.

REASONS FOR GRANTING THE WRIT

I. Although the Circuit Court said:

> "There was ample evidence to sustain the verdict for du Pont on the issue of intervening cause. We need not determine whether, had the verdict and judgment been for the appellants, we would be required to reverse under the rationale of the Ladner case.", (R. 569).

it nevertheless appears, from the extensive quotation from and discussion of the Ladner decision, that the Circuit Court obviously considered itself bound by that State court decision in the construction of the Act in relation to the facts of this case, since it held that the Act had no materiality even though the trial court had failed and refused to instruct the jury as to the existence and extent of the duty and liability of a manufacturer under the Act to the general public and ultimate consumer.

> "Congress has never essayed to declare the substantive state law, or to abolish or nullify, a right recognized by the substantive law of the state where the cause of action arose, *save where a right or duty is imposed in a field committed to Congress by the Constitution.*" (Emphasis supplied) *Sibbach* v. *Wilson & Co., Inc.*, 1941, 312 U. S. 1, 9, 10.

Here, we are dealing with "the extent and nature of the legal consequence of the condemnation" of certain unlawful acts under a federal Act in a field—interstate commerce—committed to Congress by the Constitu-

tion; hence, a State court decision has no binding effect whatsoever on the matter at issue.

II. The Federal Food, Drug, and Cosmetic Act sets up a universal and uniform standard and policy of adequacy of warning and information required to be given to the general public and ultimate consumer, through labeling and otherwise by a manufacturer of a dangerous article sold in interstate commerce. Here we are dealing with an article sold for use in manufacturing cattle feed, conclusively proved to make the feed deadly poisonous to cattle. When such a duty is breached, the legal consequences are to be determined, not by the law of the state where the cause is tried, but by that federal Act and applicable federal decisions. The manufacturer's duty extends to all foreseeable users, which would certainly include petitioners Waldron (the ultimate wholesaler and retailer) and his customers (the ultimate consumers). Whether that duty to warn ultimate consumers is fulfilled in a given set of circumstances is a factual question to be determined according to federal law (statute and decisions), not state law, by the jury in a jury case. To say that the Act is immaterial, in such circumstances, so as to allow the jury to determine the question without instruction as to the scope and extent of that duty to the ultimate consumer and public, is clearly erroneous.

III. The jury were told by the trial judge, in effect, that the petitioners were entitled to recover, unless the chain of causation was broken by an intervening cause. However, to a juror, as even to an attorney not peculiarly cognizant of the terms and effect of the Federal Food, Drug, and Cosmetic Act, including the absolute liability imposed thereby on a manufacturer or distributor in interstate commerce of an unlabeled dan

gerous article, such an instruction could not possibly carry the full import of the Act, nor the full picture of all the circumstances to be considered, in determining the sufficiency of the alleged warning given in this case by the respondent. For all that appears, the jury could well have believed that actual negligence or wilful conduct by the manufacturer was a necessary ingredient of the liability, for the Act would be meaningless to them, unless they were told (as they were not) that a violation of the Act constituted negligence *per se* as against all foreseeable users. In order to be able to adequately judge such sufficiency the jury had to have all of these circumstances in mind, and the trial court's instructions left a gaping void in this respect. For the Circuit Court of Appeals to hold, under such circumstances, that a federal act is immaterial when that act imposes a duty on manufacturers of food, drugs and cosmetics sold or distributed through interstate commerce to label and to warn the general public by labeling of the dangerous potentialities of the product if used for the purposes for which manufactured, when the evidence shows that there was no label or labeling, is serious error.

IV. The opinion generally of the Fifth Circuit Court appears, up to a certain point, to indicate that that Court felt that petitioners should not be prejudiced by the state of the record in the trial court, which indicated that technically the exceptions of petitioners to the court's failure to give any of the 20 written instructions requested (R. 203-222) (Appendix pp. 14a-27a) by petitioners, except a portion of one of them, were made after the jury had retired. Accordingly, the opinion seems to proceed to a determination on the merits of the issues raised by the lower court's failure to give the requested instructions. However, near the close of the opinion, the appellate court comments that

"The only objection of the appellants to the instructions given by the court, made before the jury retired to consider its verdict, was directed to the question of prospective damages" (R. 570). Lest we appear to have overlooked this possible ground for the appellate court's decision, we point out that the facts are as follows: As shown *ante*, pp. 36-8, when petitioners' counsel presented their requests for instruction in chambers, of which the court made no record, without reading such requests or allowing petitioners' counsel to argue the same, the court proceeded to the bench and, without warning or waiting for counsel to reenter the courtroom proceeded orally to charge the jury *before* the argument, and, after the argument and until after the jury retired, failed to make any ruling on the petitioners' requests; that the court for the first time made its ruling denying the requested instructions after the jury had retired, and that, at the earliest possible opportunity thereafter the petitioners duly excepted to such ruling. Surely, under rules 46 and 51, construed together, the exceptions were taken in time, and, if the Fifth Circuit Court's opinion does in fact base the ultimate result reached by it, which is not clear, upon the mere technicality of what appears on the record as to the time of the exceptions, then it is in error.

V. This case also presents a question of first impression, whether the Federal Food, Drug, and Cosmetic Act creates a new and independent federal civil cause of action based on failure by a manufacturer or distributor of articles sold or distributed in interstate commerce to adequately perform the duty of placing labels on his product or labeling so as to warn adequately all foreseeable users of the potential dangers of using the product for the purposes for which it is manufactured or distributed.

ARGUMENT

Question I. The complaints being expressly bottomed on a claim of a federal question involving a federal cause of action under a federal statute—the Federal Food, Drug, and Cosmetic Act—local statutes and decisions are not controlling.

In each of the complaints in the trial court the petitioners (plaintiffs therein) alleged in practically identical language:

> "4. The jurisdiction of the Court is invoked under Section 1332, Title 28, U. S. Code, June 25, 1948, c. 646, 62 Stat. 930 [diversity of citizenship]; and under the Federal Food, Drug, and Cosmetic Act, Chapter 9, Title 21, U. S. Code, June 25, 1938, c. 675, 52 Stat. 1040 [federal question]."

(R. 26, Nishida complaint; R. 135 Sokei complaint; R. 170-171, Waldron complaint). Likewise, throughout each complaint, manufacture and sale in interstate commerce by respondent in violation of the Federal Food, Drug, and Cosmetic Act, is alleged. (See, for example, in the Nishida complaint, the other complaints containing substantially identical allegations, paragraph 14, Count 1, R. 29-30; paragraphs 8 and 11, Count 4, R. 39, 40). It thus appears that the complaints are expressly bottomed on both diversity of citizenship and the existence of a federal question.

The Circuit Court of Appeals, stated:

> "There was ample evidence to sustain the verdict for du Pont on the issue of intervening cause. We need not determine whether, had the verdict and judgment been for the appellants, we would be required to reverse under the rationale of the Ladner case." (R. 569).

Nevertheless, a reading of the entire decision indicates that the Circuit Court considered itself bound by the rulings in that State decision.

After stating that, in the *Ladner* case,

> "Upon a trial the testimony of Ford as to the discussion with Armstrong was the same as in the case here decided, in fact in this case a transcript of Ford's testimony in the Ladner case was, by agreement, used in lieu of a deposition or other testimony by Ford," (R. 566),

the Circuit Court said, among other things,

> "The Missssippi court held as a matter of law, as was found by the jury in the case before us as a matter of fact, that the sales by Magnolia of the tri-processed meal for cattle feed after being warned was an intervening act which broke the chain of causal relationship between du Pont's negligence and the injury to the cattle." (R. 567).

Then, continuing, the court quoted copiously from the *Ladner* case (R. 567-568).

It is to be noted that the *Ladner* decision, among other things, stated:

> "In view of the conclusions that we have reached on the question of proximate cause, it is not necessary for us to consider the question as to whether the Federal Food, Drug and Cosmetic Act was applicable to the sale of trichloroethylene by du Pont to Magnolia." (R. 79).

The Circuit Court of Appeals likewise held:

> ". . . Some of the instructions requested ,such as those involving violations of the Federal Food, Drug and Cosmetic Act and the Hawaii Food, Drug and Cosmetic Act, had no materiality in view

of the instruction that the verdict should be for the appellants unless the chain of causation was broken." (R. 570).

If, as we believe, the Circuit Court felt itself bound by the *Ladner* decision, then it was in error.

"When a federal statute condemns an act as unlawful the extent and nature of the legal consequence of the condemnation . . . are . . . federal questions, the answer to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield,". *Picking* v. *Pennsylvania R. Co.*, 3d Cir. (1945) 151 F. 2d 240, 251 quoting *Sola Electric Co.* v. *Jefferson Co.*, 317 U. S. 173, 176.

"Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States; but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution." *Sibbach* v. *Wilson & Co., Inc.* (1941) 312 U. S. 1, 9, 10.

". . . For here a different question is presented—whether the doctrine of estoppel as invoked below is so in conflict with the Sherman Act's prohibition of price fixing that this court may resolve the question even though its conclusion be contrary to that of a state court.

* * * * *

"It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common

law rules. In such a case our decision is not controlled by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296; *Prudence Corporation* v. *Geist*, 316 U. S. 89, 95; *Board of Comm'rs.* v. *United States*, 308 U. S. 343, 349-50; cf. *O'Brien* v. *Western Union Telegraph Co.*, 113 F. 2d 539, 541. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. [citing cases]" *Sola Electric Co.* v. *Jefferson Co.*, (1942) 317 U. S. 173, 175, 176.

See, also, *Philco Corp.* v. *Phillips Mfg. Co.*, (CCA 7, 1943), 133 F. 2d 663; *Stephenson* v. *Grand Trunk Western R. Co.*, (CCA 7, 1940), 110 F. 2d 401, cert. den. 311 U. S. 720.

The very definite federal policy established by the Federal Food, Drug, and Cosmetic Act is to give adequate protection to the buying public and it has been so interpreted by the federal courts. See, for example, *United States* v. *Dotterweich* (1943), 320 U. S. 277, discussed post. As pointed out post, under Point V, the Act creates a new and independent federal cause of action, based upon this federal policy and on the prin-

ciple that, where there is a wrong there must be a remedy. This federal policy is not to be thwarted by conflicting or narrower state laws or decisions.

This principle is clearly sustained in 54 Am. Jur., UNITED STATES COURTS, 974, 975, sec. 352, wherein it is stated:

> "WHERE QUESTION IS DEPENDENT ON FEDERAL CONSTITUTION, TREATY OR STATUTE.—It is a familiar doctrine that the prohibition of a Federal statute may not be set at naught or its benefits denied by state statutes or state common-law rules. So, the rule of Erie R. Co. v. Tompkins leaves untouched questions dependent upon the Constitution, treaties, or statutes of the United States; the duty of Federal courts to follow state laws and decisions, under the rule laid down in that case, does not extend to matters governed by the Federal Constitution, by treaties of the United States, or by act of Congress. . . .
>
> "The doctrine of the Tompkins Case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of Federal statutes that legal relations which they affect must be deemed governed by Federal law having its source in those statutes, rather than by local law. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, although left by the statute to judicial determination, are nevertheless Federal questions the answers to which are to be derived from the statute and the Federal policy which it has adopted. To the Federal statute and policy, conflicting state law and policy must yield. The duty of Federal courts to follow state laws and decisions, under the rule laid down in Erie R. Co. v. Tompkins, does not include matters affecting the extent of the Federal courts' jurisdiction."

To the same effect is *D'Oench, Duhme & Co., Inc.* v. *Federal Deposit Ins. Corp.* (1942) 315 U. S. 447, 456, where suit was filed in Missouri on a note payable to a bank in Illinois; the court held in that case that the district court and the circuit court of appeals were in error in applying the law of Illinois, saying:

> "For we are of the view that the liability of petitioner on the note involves decision of a federal not a state, question under the rule of *Deitrick* v. *Greany*, 309 U. S. 190."

If, therefore, our contentions that the present actions involved federal causes of action raising federal questions and determined by the policy of a federal act, and that the circuit court of appeals considered itself bound by the Mississippi *Ladner* decision, are correct, then obviously the circuit court was in error, because *Erie Railroad* v. *Tompkins*, 304 U. S. 64 and *Klaxon Co.* v. *Stentor Electric Mfg. Co.* (1941), 313 U. S. 487, are inapplicable.

Other cases sustaining this principle are:

Am. Surety Co. v. *Beth. Nat. Bank* (1941), 314 U. S. 314;
Bd. of Trade v. *Johnson* (1924), 264 U. S. 1;
Kreitlein v. *Ferger* (1915), 238 U. S. 21;
Mo., K. & T. R. Co. v. *Harriman* (1913), 227 U. S. 657;
Fleenor v. *Hammond* (CCA 6, 1941), 116 F. 2d 982;
Luken v. *Lake Shore & M. S. Ry. Co.* (1911), 248 Ill. 377, 94 N. E. 175;
Com. v. *Peoples Express Co.* (1909), 201 Mass. 564, 88 N. E. 420;
Cook v. *Northern Pac. Ry. Co.* (1915), 32 N. D. 340, 155 N. W. 867;
Western Un. Teleg. Co. v. *Bowles* (1919), 124 Va. 730, 98 S. E. 645;

Wogahn v. *Stevens* (1940), 236 Wis. 122, 294 N. W. 503;
Clearfield Trust Co. v. *U. S.* (1943), 318 U. S. 363.

Question II. An undisputed violation of the Federal Food, Drug, and Cosmetic Act makes the Act material to the issues of actions brought thereunder.

The provisions of the Federal Food, Drug, and Cosmetic Act (21 U. S. C. A. 301-392) directly pertinent to these causes of action are:

"Sec. 321. Definitions; generally
For the purposes of this chapter—

(a) The term 'Territory' means any Territory or possession of the United States, . . .

(b) The term 'interstate commerce' means (1) commerce between any State or Territory and any place outside thereof, . . .

. . .

(f) The term 'food' means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

(g) The term 'drug' means (1) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; . . .

. . .

(j) The term 'official compendium' means the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, official National Formulary, or any supplement to any of them.

(k) The term 'label' means a display of written, printed, or graphic matter upon the immediate

container of any article; and a requirement made by or under the authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

. . .

(m) The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

(n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual."

"Sec. 331. Prohibited acts

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise."

"Sec. 352. Misbranded drugs and devices

A drug or device shall be deemed to be misbranded—

False or Misleading Label

(a) If its labeling is false or misleading in any particular.

. . .

Prominence of Information on Label

(c) If any word, statement, or other information required by or under authority of this chapter to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

. . .

Directions for Use and Warnings on Label

(f) Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users; . . ."

The pertinency of the above-quoted provisions to the petitioners' actions lies in the fact that there is no evidence that du Pont, by label, labeling, or through any media, public or otherwise, warned the petitioners or the general public of the dangerously harmful effect of

feeding the trichloroethylene-extracted meal to cattle, a duty it was required to carry out under the Act.

Respondent's witness, Mr. Shepherd, although head of its Chlorine Products Division, did not know if drums containing the product tri manufactured under his supervision and shipped through interstate commerce were labeled. This statement he made with regard to drums shipped to Magnolia prior to the date of delivery of his letter of July 31, 1951 (Ex. 35, R. 290), as well as thereafter (R. 472, 473).

Respondent's witness Armstrong also said that he did not know if labels were on the drums of tri shipped to Magnolia (R. 438) and with regard to recommending or suggesting to Magnolia that it place labels on the bags in which it shipped meal, no instructions, not even a suggestion had been made at any time before or after the delivery of the letter of July 31, 1951 (Ex. 35), that Magnolia label its product, the label to state in effect that the meal was not to be used for feed for cattle (R. 438, 439).

Another du Pont witness, McDonald, testified that tri was received by Magnolia from du Pont in drums with no label other than "that it was trichloroethylene" and "That's the only thing I ever saw in the way of label on those drums" (R. 390).

The Federal Food, Drug, and Cosmetic Act sets up a universal and uniform standard and policy of adequacy of warning and information required to be given to the general public and ultimate consumer, through labeling and otherwise, by a manufacturer of a dangerous article sold in interstate commerce. Here we are dealing with a chemical solvent, listed in the official United States Pharmacopoeia as a drug (R. 344), sold

for use in manufacturing cattle feed, conclusively proved to make the feed deadly poisonous to cattle. When such a duty is breached, the legal consequences are to be determined, not by the law of the state where the cause is tried, but by the federal Act and applicable federal decisions. The manufacturer's duty extends to all foreseeable users, which would certainly include petitioner Waldron, the ultimate wholesaler and retailer, and his customers, the ultimate consumers, the remaining petitioners. Whether that duty to warn ultimate consumers is fulfilled in a given set of circumstances is a factual question to be determined according to federal law (statutes and decisions), not state law, by the jury in a jury case. To say that the Act is immaterial, in such circumstances, so as to allow the jury to determine the question without instructions as to the scope and extent of that duty (as defined by the federal statute) to the ultimate consumer and public, is to nullify the Act and disregard its purpose of protecting the general public.

See cases cited, *infra*, pp. 52-55.

> ". . . The statute relates only to the standard of care by which negligence may be determined. Whereas, prior to the act, negligence could only be shown by allegation and proof of facts showing a breach of duty; under the statute it is only necessary to establish the violation of the statute . . ." 22 Am. Jur. Food, 882, sec. 98.

Though a pure food statute does not expressly confer a right of action, a member of the public for whose benefit it was enacted may invoke its provisions for the purpose of showing negligence as a matter of law if injured by a violation of a duty so imposed. *Donaldson v. Great Atl. & Pac. Tea Co., et al.* (1938), 186 Ga.

870, 199 S. E. 213; *Gantt* v. *Columbia Coca-Cola Bottling Co.* (1939), 193 S. C. 51, 7 S. E. 2d 641. Note in 128 ALR 464.

The act was designed by the Congress to give adequate protection to the buying public, and with that view it has been so interpreted by our courts. The Supreme Court of the United States in *United States* v. *Dotterweich* (1943), 320 U. S. 277, 280, 284, 285 confirmed that view, saying:

> ". . . The purpose of this legislation [Federal Food, Drug, and Cosmetic Act] thus touch phases of the lives and health of people which, in the circumstances of modern industrialism are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. . . . In the interest of the larger good it [such legislation] puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."
>
> . . .
>
> ". . . Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing an illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless."

There is no evidence even tending to show negligence on the part of petitioners or of their having received any warning. The hazard, therefore, should not have

been placed on the innocent and it is believed that it would not have been so placed if the essential instructions had been included in the charge.

Where there is a duty to warn and the defendant fails to give the required warning, there is no assumption of risk. *Clinchfield Coal Corp.* v. *Ray* (1917), 121 Va. 318, 93 S. E. 601.

Additional authorities on the subject of adequate warning are:

Gerkin v. *Brown & Schler Co.* (1913), 177 Mich. 45, 143 N. W. 48;
McClanahan v. *California Spray-Chemical Corp.* (1953), 194 Va. 842, 75 S. E. 2d 712;
Martin v. *Maxwell-Brisco Motor Vehicle Co.* (1911), 158 Mo. App. 188, 138 S. W. 65;
Sadler v. *Lynch* (1951), 192 Va. 344;
Ebers v. *General Chemical Co.* (1945), 310 Mich. 261;
Restatement, Torts, Sec. 388;
Farley v. *Edward E. Tower Co.* and *same* v. *Standard Pyroxoloid Corp.* (1930), 271 Mass. 230, 171 N. E. 639;
Orr v. *Shell Oil Co.* (1944), 352 Mo. 288, 177 S. W. 2d 608;
Waters-Pierce Oil Co. v. *Deselms* (1909), 212 U. S. 159;
Kentucky Independent Oil Co. v. *Schaitzler* (1925), 208 Ky. 507, 271 S. W. 570;
Hopkins v. *E. I. du Pont de Nemours & Co.* (3d Cir. 1952), 199 F. 2d 930.

Notice to the intervenor is not necessarily notice to the public or ultimate consumer, as was held in *Kentucky Independent Oil Co.* v. *Schnitzler*, *supra*. In discussing *Carter* v. *Yardley & Co.* (1946), 319 Mass. 92, 64 N. E. 2d 693, it is said, in 164 ALR 372, 373:

"But whatever may be the underlying theory of liability of a manufacturer or other supplier, it is important to observe that there is present the implication that the act of the intervening purchaser or the middleman, that is, the mere act of use or resale, does not constitute a superseding cause relieving the manufacturer or supplier of liability for his original negligence. Thus, in a sense, the question here presented is whether the further factor of knowledge on the part of the intervening purchaser of the danger or defect in the article involved, or his failure to discover it or inspect therefor, is a sufficient addition to the existing intervening act of use or resale, to make it a superseding intervening cause."

The question thus raised is answered in 164 ALR 373, where the article is inherently dangerous, in this way.

". . . the courts without discussing the question of superseding or independent intervening cause, apparently have proceeded upon the theory that since the exception to the 'general rule' permitting recovery by a remote purchaser or other third person, despite the absence of any contractual relationship, is based upon a failure of the vendor to exercise the care with which he is charged for the purpose of preventing injury to such persons, and which necessarily continues through the period of intervening possession by others, liability becomes established or absolute upon an injury due to his negligence in this regard, irrespective of the knowledge of the defect or danger on the part of the intervening purchaser, or his failure to discover it or inspect therefor."

Question III. To a jury ignorant of the general subject of what constitutes an independent intervening cause sufficient to break the chain of causation originated by a defendant's negligent act, an instruction by the court, as was given here, that the plaintiffs were

entitled to recover unless the chain of causation was broken by an intervening cause, without explaining that, even without actual negligence or knowledge of the deleterious effects of tri-processed meal, the defendant was in law guilty of actionable negligence by reason of its violation of the Federal Food, Drug, and Cosmetic Act in shipping tri in interstate commerce unlabeled and without labeling, would be meaningless and confusing. The Act was an essential part of a complex set of circumstances which the jury was required to take into consideration in determining the question of intervening cause, whereas the court's mention of only the letter of July 21 (Ex. 35, R. 290) and the conflicting testimony of Ford and Armstrong relating thereto by clear implication excluded all other preceding circumstances from the jury's consideration on that issue. That, in such cases *all* of the relevant circumstances leading up to the final act which causes the injury should be considered by the jury in passing upon the questions of proximate cause and alleged independent intervening cause, is emphasized by an outstanding decision of the Supreme Court of Hawaii, the *lex loci delicti*. The Hawaii court, in *Ward* v. *I. I. S. N. Co.* (1914), 22 Haw. 66, 71, 72, after quoting with approval from the opinion of Mr. Justice Strong in *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469, 474, thus:

> ". . . In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.".

went on to discuss the question of independent intervening cause, saying:

> ". . . it is also true, that where there is an 'intermediate cause disconnected from the primary fault', such as an intervening human agency, 'self-operating,' which comes between the act of negligence and the injury, the negligence alleged is not the proximate cause of the injury, unless a reasonable and prudent person should have foreseen that his negligent act would set the intervening cause or human agency in motion. The crucial question, the pivotal fact, in the case at bar is, therefore, whether the 'primary fault,' the negligence of the defendant, and the injury of the plaintiff are 'naturally and probably connected with each other by a continuous sequence, or dissevered by a new and independent agency.' This is not a question of science or legal knowledge, but a question of fact for a jury to *'answer in the light of all the attending circumstances, and in accordance with common sense and understanding.'* [citing cases.]" (Empahsis supplied.)

And on this point, the Massachusetts court held, in *Annie M. Thornhill v. Carpenter Morton Co.* (1915), 220 Mass. 593, 597, 598:

> "It is settled that, whether the defendant was responsible in damages to the plaintiff because of the inherently dangerous properties of its article, denominated a stain of which no notice was given and of which the purchaser had no knowledge, was upon *all the evidence in the record a question of fact for the jury under appropriate instructions.*" (Emphasis supplied.)

It was important that the jury be made to understand that proximate cause need not be the sole cause of the injuries—that it may be either the sole or a

concurring cause contributing to the result. *Boden* v. *Harter* (1931), 41 S. W. 2d 920, 240 Ky. 138; *Reilly* v. *Buster* (Tex. Civ. App., 1932), 52 S. W. 2d 521, 524. Where several causes concur to produce certain results either cause may be termed the proximate cause if it is an efficient cause of the result in question. *Young* v. *Syracuse B. & N. Y. R. Co.* (1899), 61 NYS 202, 204. The law of causation in Hawaii is that the jury is to decide the question. The rule is stated in *Hughes* v. *McGregor* (1916), 23 Haw. 156, 158, 159, in this language:

> "Where one of two or more acts of negligence may be the proximate cause of an injury, or where there is any doubt as to the proximate cause, the question is to be left to the jury * * *."

See, also, *Martin* v. *Wilson* (1915), 23 Haw. 74.

The instructions requested by petitioners, which were virtually totally ignored and denied by the trial court, would have informed the jury as to these important elements to be considered.

The rule that violation of statutes such as the Federal Food, Drug, and Cosmetic Act, constitutes negligence *per se* is well stated in *Osborne* v. *McMasters* (1889), 40 Minn. 103, 104, 105:

> "It is now well settled, certainly in this state, that where a statute or municipal ordinance imposes upon any person a specific duty, for the protection or benefit of others, if he neglects to perform that duty he is liable 'to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect.'"

"It is immaterial whether the duty has been imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. In either case the failure to perform the duty constitutes negligence, and renders the party liable for injuries resulting from it. The only difference is that in the one case the measure of legal duty is to be determined upon common-law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence, or in other words, negligence *per se*."

The rule is similarly stated in *Pine Grove Poultry Farm Inc.* v. *Newtown By-Products Mfg. Co.* (1928), 248 N. Y. 293, 162 N. E. 84, 85:

"The right to maintain an action for the breach of a statutory duty is not restricted to one suffering an injury to the person. Property rights also come within the protection of a statute imposing a duty for the benefit of the general public. Such a rule has been applied by us to a violation of the Farms and Market Law in a case where no privity of contract existed between the party guilty of the violation and the one incurring the damage. No element of ordinary negligence is essential. Violation of the statute becomes actionable default."

In *Tate* v. *Mauldin* (1930), 157 S. C. 392, 397, 154 S. E. 431, 433, the court quoted with approval from 26 C. J. 783, 785 as follows:

"(2) If a manufacturer of a food product disobeys the prohibition or neglects to perform the duty imposed by a pure food statute, negligence is implied from such violation or neglect, and he is liable for injuries resulting from the unwholesomeness of such food product regardless of his knowledge of its unwholesomeness."

In *Gantt* v. *Columbia Coca-Cola Bottling Co.* (S. C. 1940), 7 S. E. 2d 641, 643, 644, the court said:

> ". . . If therefore, it is found from the preponderance of the evidence that the bottle of coca-cola in question was bottled and sold by the defendant company, and that it contained at the time of the sale and delivery thereof by the company the alleged poisonous or deleterious matter, this would be a violation of the statute, and therefore, negligence per se. It then follows that evidence tending to show a violation of the statute, or negligence per se, would require the submission of the case to the jury, so far as negligence is concerned, although there was no other evidence of negligence, either direct or circumstantial."

In an action under the Federal Food and Drug Act of 1906, the court in *Armour* v. *Wanamaker* (CCA 3, 1913), 202 Fed. 423, 424, said:

> "The proofs on behalf of the plaintiffs, which was the only testimony in the cases, tended to show that Mrs. Armour, the decedent, a few days before her death, bought in defendant's store in Philadelphia hair tonic contained in a bottle closed with a tight ground glass stopper. The bottle was labeled as being an 'Extract from Herbs, Roots and Flowers,' but in reality about 60 per cent. to 80 per cent. of it was alcohol. Under the legislative definition of section 8 of the federal Food and Drug Act of 1906, this bottle was misbranded, in that said section provides that there is a misbranding, 'in case of drugs . . . if the package fail to bear a statement of the quantity or proportion of any alcohol . . . contained therein.' The proofs also tended to show that, in further contravention of the provisions of section 2 of said act, which provides 'that the introduction into any state . . . from any other state . . . of any . . . drugs . . . which is misbranded, is hereby prohibited,' the defend

ant delivered said misbranded bottle to the purchasers home in New Jersey. The omission of the defendant to properly brand, as required by statute, this bottle as containing alcohol, and the introduction of the package into an interstate commerce prohibited by the act, clearly afforded competent evidence for submission to a jury on the question of defendant's negligence. The principle is clear that the omission to fulfill a statutory imposed obligation creates statutory negligence."

Other cases holding that the violation of a statute such as the Federal Food, Drug, and Cosmetic Act constitutes negligence *per se*, are:

Donaldson v. Great Atlantic and Pac. Tea Co. (Ga. 1938), 199 S. E. 213, *supra;*
Whatley v. Henry (Ga. 1941), 16 S. E. 2d 214, 219; 65 Ga. App. 668;
Crist v. Fitzgerald (1949), 189 Va. 109;
Mossrud v. Lee (1916), 163 Wis. 229, 157 N. W. 758;
Swoboda v. Brown (1935), 129 Oh. St. 512, 196 N. E. 274;
Meyer v. Cincinnati St. Ry. (1951), 89 Oh. App. 169, 100 N. E. 2d 437.

Question IV. Petitioners were not foreclosed by Rule 51, read with Rule 46, F. R. C. P., from claiming error in the refusal of all of their offered instructions except a portion of one.

The decision of the circuit court of appeals is far from clear as to the grounds upon which it is based. The court first appears to be discussing the case on the merits, which would be entirely unnecessary if the petitioners (plaintiffs below) are foreclosed under Rule 51 from raising any question based on failure to

give petitioners' requested instructions; but in the penultimate paragraph of the decision, the court says:

> "... The only objection of the appellants to the instructions given by the court, made before the jury retired to consider its verdict, was directed to the question of prospective damages." (R. 570).

The facts, as they apply to these petitioners' requests for instructions are stated in the STATEMENT OF FACTS, ante, pp. 36-8. As will appear therefrom, when petitioners' counsel presented their 20 written requests for instruction, the court was in chambers and no record was made of the proceedings therein. The court then, without reading the requested instructions or even allowing petitioners' counsel to argue the same, walked out of chambers into the court room, and, without even waiting for petitioners' counsel to reenter the court room, proceeded to give its oral charge to the jury before the argument. The court, however, had never made any ruling on the requested instructions, and did not make one until, as shown by the record (R. 499-500) right after the jury had retired. Then, for the first time, the court stated that it was denying all petitioners' requested instructions. Immediately thereafter, and at the earliest possible opportunity to do so, the petitioners duly excepted to such ruling (R. 500). To say the least, this trial court's manner of operating left all counsel more or less open-mouthed and dazed, three of the four attorneys representing petitioners at the trial being from other jurisdictions where the trial practice was entirely more orthodox and regular.

Whereas, Rule 51 provides in part:

> "Rule 51. Instructions to Jury: Objection ... No party may assign as error the giving or the failure to give an instruction unless he objects

thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.";

Rule 46 provides:

> "Rule 46. Exceptions Unnecessary
> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to make or his objection to the action of the court and his grounds therefor; *and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.*" (Emphasis supplied.)

The failure of the trial court to give the 20 requested written instructions—*all but a part of one of them*—is, we submit, an error so grave that a miscarriage of justice may occur if Rule 51 is literally applied without regard to Rule 46. This court may, on its own motion, consider and reverse for such error.

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. See *Johnson* v. *United States*, 318 U. S. 189, 200. But there are exceptions to that rule. *United States* v. *Atkinson*, 297 U. S. 157, 160; *Clyatt* v. *United States*, 197 U. S. 207, 221-222. And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion." *Screws* v. *United States* (1945), 325 U. S. 91, 107.

In *Fuller* v. *King, et al.* (6-CA, May, 1953), 204 F. 2d 586, 591, the rule is stated thus:

> "Although no formal exception was taken by appellants to the failure of the Trial Judge to give such qualifying instructions we are of the opinion that the matter had been sufficiently called to his attention prior to the giving of the instructions to have necessitated such action on his part."

A similar ruling by the United States Court of Appeals for the District of Columbia was laid down in the following language:

> "The appellant did not strictly comply with F. R. C. P. Rule 51, 28 U. S. C. A., which provides that 'No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict. . . .' But the court had repeatedly stated its view of the law in the course of the trial and had repeatedly prevented appellant's counsel from proceeding on the opposite view. 'The purpose of exceptions is to inform the trial judge of possible errors so that he may have an opportunity to reconsider his rulings and, if necessary correct them.' *Sweeney* v. *United Feature Syndicate*, 2 Cir. 129 F. 2d 904, 905-906. It would have been only a formality for counsel to ask the court, at the end of the trial, to reverse itself. An error in instructing a jury may be raised by an appellate court, when justice seems to require, even though it cannot be raised by the appellant. Shokuwan Shimabukuro v. Higeyoshi Nagayama, 78 U. S. App. D. C. 271, 140 F. 2d 13." *Harlem Taxicab Ass'n.* v. *Nemesh*, 89 U. S. App. D. C. 123 (June 7, 1951), 191 F. 2d. 459, 461.

See, also, to the same effect, *Louisville and Nashville Railroad Co.* v. *Farmer*, 6 CA (1955), 220 F. 2d 90, 96; *Callen* v. *Pennsylvania R. Co.* (1947), 162 F. 2d 832.

Last, but not least, we cite the following excerpt from *Montgomery* v. *Virginia Stage Lines* (U. S. App. D. C. June 28, 1951), 89 U. S. App. D. C. 213, 216, 191 F. 2d 770, 773, which is squarely in point on the facts:

> "A few moments prior to argument to the jury counsel for plaintiff stated, 'If Your Honor please, I have some special prayers which I would like to present.' The court responded, 'Submit your instructions in writing and I will pass upon them.' There ensued a brief discussion about the time likely to be consumed in argument. Then, as the transcript indicates, the arguments were made, followed by a short recess, whereupon the court instructed the jury. It does not appear when the requested instructions were submitted or acted upon, except that they bear the notations to which we have referred, dated the last day of the trial. If they were submitted after the charge was made, or if they had been previously submitted and were pending and unacted upon when the charge was completed, objections to their denial should be deemed to have been made after the charge, reading Rule 51 with Rule 46. That these Rules should be considered together is held in Wright v. Farm Journal, 2 Cir., 1947, 158 F. 2d 976, where a request for a 'further instruction' is considered equivalent to an objection for purposes of Rule 51. To like effect is Williams v. Powers, 6 Cir., 1943, 135 F. 2d 153, 156, where it is said: 'Rule 51 should be read in conjunction with Rule 46. The purpose of these rules is to inform the trial judge of possible errors, that he may have an opportunity to consider his rulings and if necessary to correct them, and where it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved, that is sufficient . . .'".

Question V. The Federal Food, Drug, and Cosmetic Act creates a new and independent federal civil cause of action based on failure by a manufacturer or distributor of articles sold or distributed in interstate commerce to adequately perform the duty of placing labels on his product or labeling so as to adequately warn all foreseeable users of the potential dangers of using the product for the purposes for which it was manufactured or distributed.

We have been unable to find any federal decision which squarely considers the question whether, under the Federal Food, Drug, and Cosmetic Act, a new and independent federal civil cause of action is created, which would authorize suing in a federal court on the basis of a federal question, as distinguished from the situation in a diversity case. It is believed that the mounting complexity and diversity of the problems posed in this technological age of discovery, experimentation, mass production and mass distribution, with the use of myriads of new substances, devices and processes, and combinations of the same, compounded by the varying provisions and interpretations of state and local laws (See, for instance, Kerr, A Study in Confusion, Food, Drug, Cosmetic L. J. 12:99, Feb. 1957) make it imperative that the paramount intent and policy of that federal Act be given the maximum scope and effect through uniform interpretation and enforcement throughout the country, rather than being subject to the vicissitudes of varying state rules of law and procedure which could well thwart that intent and policy. This can be done by holding that a new and independent federal civil cause of action is created by the Act, allowing action in the federal courts untrammeled by State policy, which is often unduly restrictive. The degree of enforcement of this Act,

should not depend upon the vagaries of State policy, as determined by the legislature and courts of each State.

> "Generally.—The primary wrong upon which a cause of action for negligence is based consists in the breach of a duty on the part of one person to protect another against injury, the proximate result of which is an injury to the person to whom the duty is owed. These elements of duty, breach, and injury are essentials of actionable negligence. In the absence of any one of them, no cause of action for negligence will lie." *38 Am. Jur. Negligence 651-2, Sec. 11.*

Since there was no common law requirement of affixing labels, or labeling articles, the duty to label or of labeling must depend for its creation upon the Federal Food, Drug, and Cosmetic Act, and other similar laws of the various States, the Territory of Hawaii and other local jurisdictions. Since such an act creates one of the indispensable elements for recovery on the stated theory of negligence or on any other theory, it is idle to say that such an act does not create a new cause of action. Without the act there would be no recovery. Under or because of the act, recovery is allowed. We are asking this court to recognize the actual fact that the Federal Act in fixing the arbitrary requirements of labels and labeling for goods shipped in interstate commerce created a duty, the breach of which created for the first time, a liability to a person injured thereby, and so in fact created a federal cause of action.

Decisions subsequent to *Erie Railroad* v. *Tompkins* have recognied that application of the rule of that case to the interpretation and enforcement of federal statutes would destroy, rather than promote, uni-

formity of construction and enforcement which is the end considered desirable in that case.

Picking v. *Pennsylvania R. Co.* (3d Cir. 1945), 151 F. 2d 240, 251;
Sibbach v. *Wilson & Co.* (1941), 312 U. S. 1;
Sola Electric Co. v. *Jefferson Co.* (1942), 317 U. S. 173;
Philco Corp. v. *Phillips Mfg. Co.* (CCA 7, 1943), 133 F. 2d 663;
Stephenson v. *Grand Trunk Western R. Co.* (CCA 7, 1940), 110 F. 2d 401, Cert. Den. 311 U. S. 720.

Enforcement pursuant to federal laws and the rules laid down by federal courts is the only way to secure uniformity of interpretation and enforcement and to avoid split-hair decisions on conflict-of-laws and other rulings of state courts which unduly complicate enforcement of a federal law and policy already being strained by modern conditions of manufacture, distribution and technology. Elements of atoms and electrons are today being added, removed, or transmuted, to create new substance, not heretofore known and the qualities and effects of which are unknown and may not be known until after long experimentation and experience; radiation and other processes add properties to these substances which are utterly imperceptible except through tests by highly complicated special instruments or processes. New antitoxins and drugs are being mass-administered on a nation-wide basis. They are largely covered by the Food, Drug, and Cosmetics Act and other similar acts. If those acts are within the power of Congress, as they undoubtedly are, in so far as they deal with articles affecting or affected by interstate commerce, and if they create duties to the general public, which is even more helpless against these new substances than before and therefore needs

even greater protection than previously, and if those duties are to be properly enforced so as to give to the public the protection intended, it is essential that the federal Act be uniformly interpreted, construed and enforced throughout the entire country, and not be affected by the vagaries of local law, statutory and judicial.

CONCLUSION

It is urged that this petition for a writ of certiorari should be granted so that the serious errors hereinbefore pointed out may be corrected, the important and novel question hereinabove raised may be resolved, and the existing confusion in enforcement of the rights created by the Federal Food, Drug, and Cosmetic Act may be alleviated.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16140

GEORGE T. NISHIDA and JAMES E. NISHIDA d/b/a HILO DAIRY COMPANY OF KAUAI; RYOJU SOKEI, d/b/a SOKEI DAIRY, and FRED L. WALDRON, LIMITED, *Appellants*,

versus

E. I. DU PONT DE NEMOURS & COMPANY, *Appellee*.

Appeals from the United States District Court for the Northern District of Mississippi

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(June 20, 1957)

Before RIVES, JONES and BROWN, Circuit Judges.

JONES, Circuit Judge: L. L. Ford had for some years been in the field of processing soybean oil and soybean meal by an oil extraction process, using a solvent known as hexane which is derived from petroleum. In 1950 Ford and others began the construction of a mill for the extraction of oil from soybeans. The appellee, E. I. du Pont de Nemours & Company, had developed and marketed a chemical solvent for processing soybeans known as trichloroethylene. This product was known to the trade as "tri" and our consideration for typists, typesetters and proofreaders induces us to refer to it, wherever we can, by its three-letter designation. The du Pont Company was referred to Ford by Iowa State College. du Pont

stressed the advantages of tri as a solvent, it being non-volatile and of extremely high recovery. Ford and his associates were furnished with technical information and advice by du Pont during the planning and building of the mill. While the mill was under construction Ford and his associates formed a corporation under the name of Magnolia Soy Products Company. The Corporation took over the mill. The mill was completed and the production of soybean meal was commenced in March of 1951, using tri as a solvent for the extraction of oil from soybeans. The soybean meal was sold for cattle feed.

The use of tri in the processing of soybean meal was not new, and the harmful effect of tri-extracted meal had occasionally been suspected. In 1916 a report known as the Stockman Report discussed the death of cattle in Scotland after being fed tri-extracted soybean meal. Stockman concluded that tri itself in comparatively large doses was not poisonous to cattle but that in the process of extracting the oil from soybean a poisonous substance was formed and he recommended that this method be discontinued. In the 1930's experiments at Cornell University were financed by du Pont and conducted by Dr. Vollersten to determine the effect of tri-extracted soybean meal upon cattle. He concluded that the tri process, properly operated, did not produce a dangerous product. In Iowa and Colorado there was an outbreak of a hemorrhagic cattle disease similar to those discribed in the Stockman report and in the report of Dr. Vollersten on the Cornell experiment. In August of 1950, which was before the mill of Magnolia had been constructed, Ford had a discussion with T. J. Milligan of du Pont in which Ford expressed his concern about reports he had received as to the toxicity of soybean meal extracted with tri. Ford quoted Milligan as saying there was nothing to the rumors. Ford requested a letter of assurance. Milligan wrote and in his letter referred to a "smear campaign" which he said was maligning the quality of tri-extracted soybean meal. With

the letter was an appendix. In this paper du Pont mentioned the then recent attacks of hemorrhagic cattle disease in Iowa and Colorado and related the investigations which had been made to ascertain the cause. In this appendix du Pont stated that soybean processors, veterinarians, and university veterinary faculties with whom du Pont had discussed the cases had concluded that soybean meal was probably not the cause. Also included with the letter of August 11, 1950, was a mimeographed paper captioned "Trichloroethylene Soybean Extraction". In this paper it was stated that du Pont "with its faith in the process was actively promoting its use". There it was also said, "In considering this process, we also respectfully suggest that a company with the national prominence and reputation of 'du Pont' can scarcely risk recommending a process such as trichloroethylene extraction unless we are absolutely convinced as to the quality and marketability of the product that it will produce and the cost at which it will operate".

In January of 1951 there was an outbreak of the hemorrhagic disease in Minnesota from which a number of cows and calves fed on tri-processed soybean meal died. R. Stuart Armstrong, a Solvents Technical Representative in the employ of du Pont, went to the University of Minnesota in May or June and arranged for it to conduct research into the cause of the disease with du Pont financing the program. The report of the University of Minnesota investigation was published in October of 1951 and read by Armstrong during the following month. It showed that one of two calves fed tri-extracted soybean meal died. This report was not communicated by du Pont to Magnolia.

On July 31, 1951, C. B. Shepherd, Manager of the Chlorine Products Division of du Pont, wrote to Magnolia stating that there were increasing indications that tri-extracted soybean meal might be associated with a hemorrhagic disease in cattle which had been observed in widely scattered areas. It was said that despite satisfac-

tory experiments in the past, the possibility could not be ignored that the meal might be associated with the disease. The final paragraph of the letter said:

> "In view of the present uncertainty, we strongly recommend that sales of trichloroethylene-extracted meal be confined to outlets other than cattle feed until more definite information is available from the investigations now underway in Minnesota and Iowa. To the best of our knowledge, the hemorrhagic disease in question is peculiar to cattle only, and all available evidence and experience indicates that trichloroethylene-extracted meal is entirely satisfactory as a component for feeding hogs and poultry".

This letter was delivered on August 1, 1951, by Armstrong to Ford and Reed of the Magnolia Company. There is a wide divergence between the testimony of Ford and the testimony of Armstrong as to what was said at the time of the delivery of the letter. Ford testified that he told Armstrong "here you've let us spend $500,000 building this mill and now you tell us we can't use it to manufacture feed." Ford quoted Armstrong as replying "the reason I brought it [the letter] personally was because I didn't want you to get excited about it." Ford's testimony continued, "I asked him 'does the du Pont Company know we can't operate our mill and have built one here that cost $500,000? If we can't sell it for cattle feed we can't operate it. Did du Pont tell us to shut it down? Do they have evidence?' and he said 'No, there isn't any evidence conclusive, there's rumors circulated from time to time'." Ford quoted Armstrong as saying also that so far as he knew there wasn't any evidence that tri-extracted meal had anything to do with cattle losses. Ford said he asked Armstrong point blank if du Pont would recommend the closing down of the plant because meal couldn't be sold for cow feed and gave Armstrong's reply as negative. Armstrong testified that he delivered letters such as the

one quoted to all known users of tri in soybean extraction, there being four such mills besides Magnolia. Armstrong denied making the statements attributed to him by Ford. Armstrongs testimony was that a discussion was had of the possibility of operating the mill for the production of meal for swine and poultry feeds.

In October 1951, a weekly periodical, "Feedstuffs," published for those in the business of producing and marketing feeds, reported that the Association of American Feed Control Officials had adopted a resolution discouraging the use of tri-extracted soybean meal as feed for cattle and calves until it had been proved that these products were nontoxic for such animals and that such products should be labeled with a warning prohibiting the use of such meal for cattle feed. Armstrong testified that Reed, an officer of Magnolia, had admitted seeing the publication. Subsequent to these events, Magnolia ordered and du Pont supplied it with further shipments of tri.

Fred Waldron, Ltd., a dealer in animal feeds in Honolulu, Hawaii, ordered 200 tons of soybean meal from The Broad [Brode] Corporation, of Memphis, Tennessee, which in turn ordered the meal from Magnolia. The order was filled by it. The appellants Nishida operated a dairy in Hawaii as did the appellant Sokei. These dairymen purchased from Waldron soybean meal made by Magnolia, fed it to their cattle and many of the cattle died and others became violently ill. Waldron sold meal to other cattle owners who fed it to their cattle with similar results. The Nishidas and Sokei brought suits in the court in Hawaii against Waldron for their losses and the other cattle owners who had sustained losses asserted claims against Waldron. The Nishidas, Sokei and Waldron each brought an action in the District Court for the Northern District of Mississippi against du Pont for the losses and damage claimed to have been sustained as a result of the feeding of the soybean meal. Each complaint was in three counts; count one asserted breach of an implied warranty that soybean meal

manufactured by the tri process would be fit and wholesome feed for cattle; count two set up a breach of an implied warranty to all purchasers that soybean meal so manufactured would be of merchantable quality; and count four (count three being eliminated) being based on negligence. The cases were consolidated for trial.

At the close of the evidence and after motions for directed verdicts for the defendant had been made and denied, the court gave its charge to the jury. The court instructed the jury that du Pont had collaborated with those who had built the Magnolia mill and represented to them that tri-processed soybean meal was a safe product for the feeding of cattle; that after such representations Magnolia manufactured meal which was ultimately fed by the Nishidas, by Sokei and others to cattle and as a result of such feeding cattle died and no reasonable man could come to any other conclusion; and that, though the chemical reaction had not been ascertained, the feeding of tri-extracted soybean meal does kill cattle. The court told the jury that the case was to be determined by what the jury thought of the factual situation with respect to the letter written by Dr. Shepherd and delivered by Mr. Armstrong to Magnolia early in August, 1951. After mentioning that the jury would recall what the letter said, the court said, "That, by the defendant is alleged to have broken the chain of causation from the legal standpoint in this case. If it did not break the chain of causation from the legal standpoint in this case, I think your verdict would bound to be for the plaintiffs in this case. If it did break the chain of causation then your verdict should be for the defendant in this case". If, said the court, the actions of the defendant were not such as would have caused a reasonably prudent man to desist in the selling of tri-processed soybean meal for cattle feed, or were such that it knew or should have known that Magnolia would continue to sell such meal for cattle feed without regarding such sales as extraordinary, then the jury should find for the

plaintiffs. The court pointed out to the jury the conflicts between the testimony of Ford and that of Armstrong. Instructions were given as to the burden of proof and upon damages. At the conclusion of the court's charge an objection was made by one of the attorneys for the defendant to a portion of the court's instructions, and the objection was overruled. Counsel for the plaintiffs then stated, "For the record, your Honor, may we most respectfully raise the question of law by excepting to the court's ruling, ruling out possible prospective profits?" The court responded, "Yes, sir, you may do that." The case was argued to the jury and the jury retired to begin its deliberations. While the jury was out counsel for the plaintiffs made the statement, "And may it please Your Honor, may we be permitted to except to the court's ruling in denying the submission of the proposed instructions to the jury." The court then said, "Oh certainly, gentlemen, you may have an exception to that. You have a right to except to any ruling of the court." The jury returned a verdict for the defendant. Motions for a new trial were overruled and judgments for the defendant were entered.

The appellants, plaintiffs in the district court, have twenty-one specifications of error. It is stated that the verdict of the jury is contrary to the overwhelming weight of evidence, that the verdict is contrary to law, and that the court erred in admitting certain evidence over the appellants' objection. The other specifications of error, eighteen in number, relate to the court's instructions to the jury. The appellants do not designate the evidence which they believe was erroneously admitted either in their specifications of error or in their briefs. We shall treat the question as abandoned.

The court instructed the jury that the determinative question in the case arose with respect to the letter of du Pont to Magnolia written in July, 1951, and delivered August 3, 1951; that if the letter did not break the chain

of causation the verdict should be for the plaintiffs; and that if it did break the chain of causation the verdict should be for the defendant. These instructions eliminated from the case any question as to whether it had been shown that the tri-processed meal was the cause of the death and disease of the cattle. The issue submitted to the jury was as to whether there was an intervening cause in the conduct of Magnolia which relieved du Pont from such liability as it would otherwise have had.

In 1954 the Supreme Court of Mississippi decided *E. I. du Pont de Nemours Company* v. *Ladner*, 221 Miss. 378, 73 So. 2d 249. Ladner bought soybean meal from one Thigpen, a retail feed dealer and fed it to his cattle and five of them died. The meal was processed by Magnolia with the use of tri as a solvent and sold by Magnolia to the dealer in the fall of 1951 and delivered to him about November 11th of that year. Ladner sued Magnolia and du Pont. Magnolia made a settlement and the cause was dismissed as to it. Upon a trial the testimony of Ford as to the discussion with Armstrong was the same as in the case here decided, in fact in this case a transcript of Ford's testimony in the Ladner case was, by agreement, used in lieu of a deposition or other testimony by Ford. Ladner recovered a judgment. The Supreme Court of Mississippi reversed and held that the warning letter was clear and du Pont was not liable for the failure of Magnolia to heed the warning. The rule of law applicable was quoted from American Jurisprudence and is thus stated:

> "One who acts negligently is not bound necessarily to anticipate that another person will be negligent after the latter has discovered the danger arising from the former's negligence. The first actor, however, is not permitted to assume that the second actor will discover the danger caused by the first actor's negligence. Accordingly, where the second actor after having become aware of the existence of a potential danger created by the negligence of the first actor, acts

> negligently in respect of the dangerous situation and thereby brings about an accident with injurious consequences to others, the first actor is relieved of liability, because the condition created by him was merely a circumstance and not the proximate cause of the accident." 38 Am. Jur. 731, Negligence, par. 72.

The Mississippi court held as a matter of law, as was found by the jury in the case before us as a matter of fact, that the sales by Magnolia of the tri-processed meal for cattle feed after being warned was an intervening act which broke the chain of causal relationship between du Pont's negligence and the injury to the cattle. The Mississippi court said:

> "After R. Stewart Armstrong had delivered Du Pont's warning letter to Ford and Reed on August 3, 1951, Du Pont had a right to believe that Magnolia would confine its sales of tri-extracted soybean meal to outlets other than cattle feed until more definite information was available from the investigations then under way. Du Pont had a right to believe that the warning letter would not be disregarded; and we think that Magnolia's conscious act in refusing to heed the warning and in selling the carload of tri-extracted soybean meal to Thigpen for cattle feeding purposes after being apprised of the potential danger, constituted an independent, efficient intervening cause, which was not foreseeable by Du Pont, or, in other words, constituted a superseding cause of the injury operating to eliminate Du Pont's responsibility for its original negligence, if there was such negligence in fact." *E. I. Du Pont de Nemours & Co.* v. *Ladner*, 73 So. 2d 249, 256.

The doctrine as to intervening cause has been set forth in these words:

> "The connection between the defendant's negligence and the plaintiff's injury may be broken by

an intervening cause. Intervening cause is merely proximate cause flowing from a source not connected with the party sought to be charged. While the term may have some descriptive value, unduly elaborate discussion of intervening cause as such tends to becloud rather than clarify the relatively simple idea of causal connection. When it is determined that a defendant is relieved of liability by reason of intervening cause, it would appear to mean simply that the negligent conduct of someone else—and not that of defendant—is the proximate cause of the event.

"When the natural and continuous sequence of causal connection between the negligent conduct and the injury is interrupted by a new and independent cause, which itself produces the injury, that intervening cause operates to relieve the original wrongdoer of liability. The original negligent conduct, while a cause of the injury, is merely a remote and not a proximate cause thereof." 1 Shearman & Redfield on Negligence, Rev. Ed. 99, § 37.

Du Pont acquired knowledge of the dangers of feeding tri-processed soybean meal to cattle and it might be assumed that, prior to the warning letter, Magnolia was without such knowledge or not as aware of the dangers as du Pont was or should have been. Under such circumstances du Pont was under a duty to warn Magnolia of the risks. See 1 Shearman & Redfield on Negligence, Rev. Ed. 64, § 26. Prosser on Torts, 2d Ed. 504. It follows, of course, that when a warning is given the original manufacturer or supplier, here du Pont, is not liable. See *Ford Motor Company* v. *Wagoner*, 183 Tenn. 392, 192 S. W. 2d 840, 852, 164 A.L.R. 364, and the cases cited in the A.L.R. annotation.

Unless the verdict is contrary to the great weight of evidence, it will not be disturbed on appeal. *Flewellen* v. *Logan*, 5 Cir., 1939, 106 F. 2d 151; *Travelers Insurance Co.* v. *Warrick*, 5 Cir. 1949, 172 F. 2d 516; *Good Holding Co.*

v. *Boswell*, 5 Cir. 1949, 173 F. 2d 395; cert. den. 338 U. S. 815, 70 S. Ct. 55, 94 L. Ed. 493; *Atlantic Coast Line R. Co.* v. *Mims*, 5 Cir. 1952, 199 F. 2d 582. This is also the rule in Mississippi. *Yazoo & M.V.R. Co.* v. *Smith*, 188 Miss. 856, 196 So. 230. There was ample evidence to sustain the verdict for du Pont on the issue of intervening cause. We need not determine whether, had the verdict and judgment been for the appellants, we would be required to reverse under the rationale of the Ladner case.

The appellants requested twenty separate instructions to the jury. They urge error in that they were not given and in the charges of the court as given. Some of the instructions requested, such as those involving violations of the Federal Food, Drug and Cosmetic Act and the Hawaii Food, Drug and Cosmetic Act, had no materiality in view of the instruction that the verdict should be for the appellants unless the chain of causation was broken. The court's charge as given covered all of the matters included in appellants' requested charges which were pertinent to the issues submitted. The only objection of the appellants to the instructions given by the court, made before the jury retired to consider its verdict, was directed to the question of prospective damages. In an oral opinion given by the district judge in overruling the appellants' motion for a new trial the view was expressed that the appellants had been confined to a too narrow gauge of estimate of damages but since the jury found no damages the error, if any, was harmless. We are in accord with this view.

We think that in all respects the instructions dealing with liability fairly presented the issues. No reversible error appears either in the instructions given or in those refused. See *Good Holding Co.* v. *Boswell, supra; Atlantic Coast Line R. Co.* v. *Mims, supra.*

Since we find no error prejudicial to the appellants the judgment is

AFFIRMED.

Judgment

In the United States District Court for the Northern District of Mississippi, Greenville Division

Civil Action No. 142

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v.

E. I. Du Pont de Nemours & Company, a corporation, Defendant.

This cause came on for trial before the Court and a jury, beginning on November 22, 1955, and continuing to and on November 29, 1955 (the intervening Thanksgiving and Sunday excepted), and the issues having been duly tried, and the jury on November 29, 1955, having rendered a verdict for the Defendant, it is hereby

Ordered and Adjudged, that Plaintiffs take nothing by their action, that the Defendant, E. I. du Pont de Nemours & Company, have judgment on the verdict against the Plaintiffs, George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, and that said Defendant have and recover from said Plaintiffs its costs in the action.

Dated Dec. 2, 1955.

By the Court:

HERBERT D. STEPHENS, JR.,
Clerk.

Order

In the United States District Court for the Northern District of Mississippi, Greenville Division

Civil Action No. 142

George T. Nishida and James E. Nishida, d/b/a Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v.

E. I. Du Pont de Nemours & Company, Defendant.

This day this cause coming on to be heard on the Motion for a New Trial as filed by the Plaintiffs herein, and the Court having read and considered said Motion and heard and received arguments of counsel for the Plaintiffs and Defendant thereon, and being of the opinion that neither said Motion nor the grounds thereof are well taken and that said Motion should be denied, and premises considered;

It Is Therefore Ordered and Adjudged that the Motion for a New Trial, as filed by Plaintiffs herein, George T. Nishida and James E. Nishida, d/b/a Hilo Dairy Company of Kauai, a co-partnership, be, and the same is, hereby denied.

Ordered and Adjudged this 2nd day of February, A. D. 1956.

ALLEN COX,
United States District Judge.

C.O.B. 1, Page 304.

Plaintiffs' Request for Instructions

In the United States District Court for the Northern District of Mississippi, Greenville Division

Civil Action No. 142

George T. Nishida and James E. Nishida, doing business as Hilo Dairy Company of Kauai, a co-partnership, Plaintiffs,

v.

E. I. Du Pont De Nemours & Company, Defendant.

Civil Action No. 145

Ryoju Sokei, doing business as Sokei Dairy, Plaintiff,

v.

E. I. Du Pont De Nemours & Company, a Corporation, Defendant.

Civil Action No. 143

Fred L. Waldron, Limited, Plaintiff,

v.

E. I. Du Pont De Nemours & Company, a Corporation, Defendant.

Come now plaintiffs above mentioned and hereby respectfully request that the following instructions No. 1 to No. 20 be given to the jury in the above-entitled causes.

Dated: November 29th, 1955.

PRATT, TAVARES & CASSIDY,
SHIRO KASHIWA,
INGMAN & INGMAN,
WILLIAM G. BURGIN, JR.,
ROGER E. BROOKS,

By ROGER E. BROOKS,
(Roger E. Brooks),
Attorneys for Plaintiffs.

Plaintiffs' No. 1

The Court instructs the jury that throughout these instructions, to follow, unless it is specifically stated in any instruction that it applies only to a particular case mentioned, the instruction applies to all three cases.

Plaintiffs' No. 2

The Court instructs the jury that the care of a prudent man varies according to circumstances dependent upon the degree of danger. What is the precise legal intent of the term "ordinary care" must, in the nature of things, depend upon the circumstances of each individual case. It is a relative and not an absolute term. The degree of care and foresight which is necessary in any given case must always be in proportion to the nature and magnitude of the injuries and damages which might result from the occurrence which is to be anticipated and guarded against.

Plaintiffs' No. 3

The Court instructs the jury that under the Federal Food, Drug and Cosmetic Act the causing of the introduction into interstate commerce of soy bean oil meal which is known to be intended for cattle feed and which is unfit for cattle feed is prohibited.

The said Act further prohibits the shipment in interstate commerce of tri solvent which the sender knows may become a component part of feed that is unfit for cattle and is intended to be sold for cattle feed.

The said Act further prohibits the shipment of tri solvent in interstate commerce unless the container thereof bears a label specifically informing prospective users as to its safe use.

The material provisions of this Act are attached to this instruction.

The Court instructs the jury that the Federal Food, Drug and Cosmetic Act provides, as material herein, as follows:

"Sec. 31. The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device or cosmetic that is adulterated or misbranded and the delivery or proffered delivery thereof for pay or otherwise.

(d)—

"Sec. 201. For the purposes of this Act—

(a) The term "Territory" means any Territory or possession of the United States—.

(b) The term "interstate commerce" means (1) commerce between any state or territory—.

(e) The term "person" includes individual partnership, corporation—.

(f) The term "food" means (1) articles used for food or drink for man or other animals (2) chewing gum, and (3) articles used for components of any such article.

(g) The term "drug" means (1) articles recognized in the official United States Pharmacopocia.

(k) The term "label" means a display of written, printed or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this act that any word, statement or other information appearing on the label shall not be considered

to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

(m) The term "labeling" means all label and other written, printed or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

(n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in labeling thereof or under such conditions of use as are customary or usual.

(p) The term "new drug" means—

(1) Any drug the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of drugs, as safe for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a "new drug" if at any time prior to the enactment of this Act it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use—

Sec. 303. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and

shall on conviction thereof be subject to imprisonment for not more than one year or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both imprisonment and fine.

Sec. 402. A food shall be deemed to be adulterated—(a)(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 406; (406(a) reads as follows:

Sec. 406. (a) Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2) of section 402(a);)

or (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held, under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;—

Sec. 403. A food shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular. (f) If any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such

terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

Sec. 502. A drug or device shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular. (c) If any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use. (f) Unless its labeling bears (1) adequate directions for use;—(j) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof.

Sec. 505(a) No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an application filed pursuant to subsection (b) is effective with respect to such drug.

(b) Any person may file with the Secretary an application with respect to any drug subject to the provisions of subsection (a). Such persons shall submit to the Secretary as a part of the application (1) full reports of investigations which have been made to show whether or not such drug is safe for use; (2) a full list of the articles used as components of such drug; (3) a full statement of the composition of such drug; (4) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing and packing of such drug; (5) such samples of such drug and of the articles used as components thereof as the Secretary may require; and (6) specimens of the labeling proposed to be used for such drug.

(c) An application provided for in subsection (b) shall become effective on the sixtieth day after the filing thereof

unless prior to such day the Secretary by notice to the applicant in writing postpones the effective date of the application to such time (not more than one hundred and eighty days after the filing thereof) as the Secretary deems necessary to enable him to study and investigate the application.

Plaintiffs' No. 4

The Court instructs the jury that if you find by a preponderance of the evidence that the defendant, in shipping tri solvent in interstate commerce to Magnolia Soy Products Company in the manner and at the times shown by the evidence violated the Federal Pure Food, Drug and Cosmetic Act, then by reason of such violation, the defendant was guilty of negligence as a matter of law in so shipping such tri solvent, and, unless you further find that the defendant was exonerated by an intervening cause, as covered by other instructions, then your verdict should be for the plaintiffs.

Plaintiffs' No. 5

The Court instructs the jury that if you find by a preponderance of the evidence that, in or as a result of shipping tri solvent in interstate commerce to Magnolia Soy Products Company, the defendant violated any provision of the Federal Food, Drug and Cosmetic Act, such violation is evidence, to be considered with all other evidence to determine whether the defendant was negligent in such shipping of tri solvent.

Plaintiffs' No. 6

The Court instructs the jury that the Hawaii Food, Drug and Cosmetic Act, of the Territory of Hawaii, provides that the causing of the sale, delivery or receipt in the Territory of Hawaii of feed which is known to be intended to be sold for cattle feed and which is unfit for consumption by cattle is prohibited. If you find from a preponderance of the evidence that Magnolia Soy Products

Company, hereinafter called Magnolia, was engaged in the business of manufacturing soy bean oil meal using the tri process, and that the defendant sold tri solvent to Magnolia with knowledge that Magnolia would manufacture such meal and sell the same in interstate commerce for use as cattle feed, and that the defendant knew, or by the exercise of due care should have known, that such meal when eaten by cattle was toxic to them, and that the defendant did not, before the meal involved in each suit was shipped to the Territory of Hawaii, adequately warn Magnolia that such meal might be toxic to cattle and did not label its tri solvent when sold to Magnolia in such manner as to indicate that such meal manufactured therewith would be toxic to cattle if eaten by them, and if you further find that the meal which was shipped from Magnolia was the proximate cause of the cattle deaths and illnesses claimed by the respective plaintiff or plaintiffs in the suit, such action on the part of the defendant would be a violation of the Hawaii Food, Drug and Cosmetic Act, and such a violation, if so found by you, would be evidence of negligence on the part of the defendant.

Plaintiffs' No. 7

The Court instructs the jury the proximate cause of an event must be understood to be that which in a natural sequence, unbroken by any new unforseeable intervening cause, produced that event and without which the event would not have happened.

Plaintiffs' No. 8

The Court instructs the jury that a new and independent cause is an intervening efficient force which breaks the casual connection between the original wrong and the injury. Such new force must be sufficient of itself to stand as the cause of the injury and be one but for which the injury would not have occurred. The term "new" refers to and means a cause incapable of being reasonably foreseen by

the original wrongdoer by the use of ordinary care on his part; and the word "independent" refers to and means the absence of the relation of cause and effect between the new cause and the original wrongful act or omission. And, unless the intervening cause is both new and independent, sufficient of itself to stand as the cause of the injury, breaking the causal connection, the original wrongdoer is not relieved from the legal responsibility for his wrong or negligence.

Plaintiffs' No. 9.

The Court instructs the jury that if you find that defendant du Pont induced Magnolia Soy Products Company (sometimes called "Magnolia" in these instructions), or the predecessors in interest of Magnolia, or both, to construct a tri-process mill for the manufacture of soy bean oil meal for sale as cattle feed, upon the representation by defendant that the tri-process would produce soy bean oil meal that would be fit for cattle feed and not toxic to cattle; and if you further find that the defendant was negligent in so doing; and if you further find that the damages to the plaintiffs were caused by the subsequent acts of Magnolia in manufacturing and selling such meal; then such subsequent acts of Magnolia would not be a sufficient intervening cause to discharge the defendant from liability for its negligence if:

(a) du Pont at the time of its negligent acts should have realized that Magnolia would so act; or

(b) a reasonable man, knowing the situation existing when Magnolia's acts causing the injury to plaintiffs took place, would not regard Magnolia's said actions as highly extraordinary; or

(c) Magnolia's acts which caused the injuries to plaintiffs were a normal response to a situation created by du Pont's conduct and the manner in which Magnolia acted was not extraordinarily negligent.

Plaintiffs' No. 10.

The Court instructs the jury that an intervening act of a third person, negligent in itself, is not a superseding cause of injury to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or (b) a reasonably prudent man knowing the existing situation when the act of the third person was done would not regard it as highly extraordinary that the third person should so act. Therefore, if you find from a preponderance of the evidence that the construction of the mill of the Magnolia Soy Products Company as a mill designed to use only the trichloroethylene process of extraction was negligently induced by the defendant through representations that the trichloroethylene process would produce soy bean oil meal fit for cattle feed; that the defendant sold tri solvent to the Magnolia Soy Products Company knowing that it was to be used by that Company to manufacture soy bean oil meal for sale in interstate commerce as cattle feed; and that the actions of the defendant prior to the sale of the soy bean oil meal which was ultimately purchased by plaintiffs and used in feeding their cattle, or prior to the time when they received the same in the Territory of Hawaii, were not such as would have caused a reasonably prudent man to desist from selling such meal for cattle feed, or were such that a reasonably prudent man in the position of the defendant knew or should have known that the said Company would continue to sell such meal in interstate commerce for cattle feed and would not have regarded sale of tri meal for cattle feed by said Company as highly extraordinary under the circumstances, then your verdict should be for the plaintiffs.

Plaintiffs' No. 11.

With respect to the claim made by the defendant that the acts of a third person (namely, Magnolia Soy Products Company) intervened between the commission of any act

or acts of the defendant that might be considered negligent and the actual occurence of the damages claimed by each of the plaintiffs, the Court instructs the jury that, if you find that a reasonable person in the situation of defendant would or should have realized that there was a realizable likelihood that said Company would act in a particular manner, and that this was the hazard or one of the hazards which made the defendant negligent in act or acts, then such intervening acts, whether innocent, negligent, intentionally tortious or criminal, does not or do not prevent the defendant from being liable to plaintiff or plaintiffs.

Plaintiffs' No. 12.

The Court instructs the jury that, where a manufacturer of an article knows, or in the exercise of ordinary care should know, that such article will be put to a certain use and that such use will create unusual hazards, there arises a duty on the part of such manufacturer to adequately warn all those who may reasonably be expected to be injured or damaged by a lack of such adequate warning. Whether any warning, if given, is adequate, is a question of fact for the jury to decide under all the circumstances. If, therefore, you find that a reasonably prudent person under the circumstances the defendant was in, would have warned not only Magnolia Soy Products Company but all classes of persons each of the plaintiffs was situated in, and no such warning was given by defendant to plaintiffs nor was any reasonable effort made by defendant to warn persons generally in such situation of each of the plaintiffs, such an act of omission is evidence of negligence on the part of the defendant.

Plaintiffs' No. 13.

The Court instructs the jury that the question of whether the letter of July 31, 1951, all plaintiffs' Exhibit No. 35, delivered by Stuart Armstrong to L. L. Ford and Lyman Reed of Magnolia Soy Products Company on or about Au-

gust 2nd or 3rd, 1951, was adequate notice to that Company so as to prevent the defendant from being liable to plaintiffs for any negligent acts (if you find that the defendant did commit such negligent acts), is a question of fact to be decided by the jury in the light of all of the circumstances as found by you. These circumstances may include any circumstances which you find would have influenced a reasonably prudent man in the same situation as the Magnolia Company in determining whether or not the situation required or justified his ceasing immediately to make any further sales of tri-processed soy bean meal for purposes of cattle feed, and may include circumstances and happenings prior to, at the time of, or a reasonable time subsequent to, the delivery of that letter and before the shipping by the Magnolia Company of any of the meal that caused the damage to the plaintiff or plaintiffs (if you find that such damage was caused by such meal). The question, so far as the Magnolia Company was concerned, is what a reasonable person would have understood the letter to mean under all of the relevant circumstances as so found by you.

Plaintiffs' No. 14.

The Court instructs the jury that where a manufacturer supplies an article which he manufactures or produces, to be used for a particular purpose under such circumstances that the buyer necessarily trusts to or relies upon the judgment and skill of such manufacturer to furnish an article of that type that is fit for the particular purpose, there is an implied warranty that such article shall be fit for said purpose for which it is to be used. There is also an implied warranty, under such circumstances, that the article is merchantable for such purpose.

Plaintiffs' No. 15.

The Court instructs the jury that the implied warranty of a manufacturer of fitness for a particular use or of merchantability for such use, is not only to the immediate

buyer of the article, but for the benefit of all persons whom defendant reasonably forsaw, or should reasonably have foreseen, might be injured if the product did not measure up to the quality as warranted and such party, if injured or damaged by such failure to conform to the warranted quality, may have a remedy for breach of warranty against the manufacturer.

Plaintiffs' No. 16.

The Court instructs the jury that if concurrent or successive negligence of two persons combined results in injury to a third person, he may recover of either or both.

Plaintiffs' No. 17.

The Court instructs the jury that the measure of damages for loss of or injury to cattle is the difference between the reasonable market value immediately before the injury or loss and the reasonable market values immediately after the injury or loss.

Plaintiffs' No. 18.

The Court instructs the jury that, if your verdict is in favor of a particular plaintiff, that plaintiff is entitled to damages, if any, caused by way of death of cows, calves, injury or damage to cows or calves, loss of profits, if any, loss of customers, if any, loss of good will, if any, reasonable cost of drugs and veterinary services, if any, other expenses, if any, reasonably and necessarily incurred in connection with and as a result of the illness or death of cows and calves, or in making reasonable efforts to ascertain the cause of the cattle illnesses and deaths, or to minimize damages, or to protect the herds and businesses of the respective plaintiffs, or any combination of said expenses, which damages, losses, and expenses the jury finds to have proximately resulted from or been caused by the defendant's wrongful act or acts.

Plaintiffs' No. 19.

The Court instructs the jury that, although these three cases, namely, (1) Nishida v. du Pont, Civil Action No. 142, (2) Sokei v. du Pont, Civil Action No. 145, and (3) Waldron v. du Pont, Civil Action No. 143, have been consolidated for trial, you are to bring in separate verdicts in each action. Forms of verdict will be handed you by the Court, in each action, for each count in that action, and you will render your verdict on each such count in such manner as the facts as found by you and the law as given you by the Court may warrant. The Court will now explain the reason for submitting to you several counts in each action. The Rules of Civil Procedure of this Court permit a plaintiff, when he brings a suit, to state his cause of action or claim in several different ways, so as to attempt to cover the various possible situations that he believes the evidence might establish. In this consolidated action, each complaint in each of the three cases was originally drawn with four counts, called Count One, Count Two, Count Three, and Count Four. The Plaintiffs have all withdrawn their Count Three, so that you should disregard that count in each action.

Count One, in each action, is a count drawn on the theory or claim that, by various acts claimed by plaintiffs to have been committed by the defendant, the defendant impliedly warranted that soy bean oil meal when manufactured or extracted by the use of trichloroethylene was fit and wholesome feed for cattle, and that the defendant breached or violated that warranty and thereby proximately caused damage to plaintiffs.

Count Two, in each action, is a count drawn on the theory or claim that by various acts claimed by plaintiffs to have been committed by the defendant, the defendant impliedly warranted that soy bean oil meal, when manufactured or extracted by the use of trichloroethylene (sometimes called "tri" in these instructions), was of merchantable quality

for cattle feed—that is, that it was of a quality fit to be sold for use as cattle feed, and that the defendant breached or violated that warranty and thereby proximately caused damage to plaintiffs.

Count Four, in each action, is a count drawn on the theory or claim that by various acts claimed by plaintiffs to have been committed by defendant, including alleged violations of the Federal Food, Drug and Cosmetic Act and the Food, Drug and Cosmetic Act of the Territory of Hawaii known as the Hawaii Food, Drug and Cosmetic Act, or of the said Hawaii Food, Drug and Cosmetic Act alone, the defendant was guilty of negligence and thereby proximately caused damage to plaintiffs.

Under the forms of verdict to be handed to you in each of the three actions, you may bring in a verdict on each count either in favor of the plaintiff or plaintiffs or in favor of the defendant, as the facts found by you and the law as given by the Court may warrant. If you find in favor of the plaintiff or plaintiffs on any particular count, you should determine the amount of damages which in your judgment, based upon the evidence and the instructions of this Court, will fairly and justly compensate the plaintiff or plaintiffs for the damage suffered by such plaintiff or plaintiffs and proximately caused by any wrongful acts of the defendant which you may find to have been committed.

Plaintiffs' No. 20.

The Court instructs the jury that, if your verdict is in favor of the plaintiffs, then the following rules will govern in computing damages, if any, which might be predicated upon any settlements or payments made by Fred L. Waldron, Limited, with or to the seven dairymen on the Island of Hawaii, the Territory of Hawaii in relation to alleged damages suffered on the Island of Oahu, and Hilo Dairy and Sokei Dairy:

(a) You are instructed that the contracts of Waldron with the respective seven dairies on the Island of Hawaii and that with said Territory of Hawaii, fix the amount of the damages to Waldron for those particular items, namely, the claims of said seven dairies and of said Territory, the defendant having stipulated, subject to its defenses claimed on the merits, that these amounts are reasonable.

(b) You are instructed that, in considering any damages suffered by Waldron, you should not include in any award to Waldron any amounts advanced by Waldron to Hilo Dairy or Sokei Dairy under the settlement contracts between Waldron and each of those dairies, Nishida Plaintiffs' Exhibit No. 15 and Sokei Plaintiff's Exhibit No. 15. Under these contracts, the Hilo Dairy and the Sokei Dairy are obligated under certain circumstances to repay such advances to Waldron, depending upon the amounts of their respective recoveries, if they recover against the defendant. Therefore, such advances should neither be included in any damages awarded to Waldron, nor deducted from any damages awarded to either Hilo Dairy or Sokei Dairy. In this way, double payments of any damages awarded can be avoided. However, if you find that the making of such advances was necessary and reasonable on Waldron's part under all the circumstances, and that the making of such advances caused a shortage of credit or working capital to Waldron and this contributed to Waldron's damages, you may take into consideration any such effects of shortening credit or working capital in computing Waldron's damages, though not adding the payments themselves to any verdict for Waldron.

Office - Supreme Court, U.S.
FILED
DEC 12 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957.

No. 615.

GEORGE T. NISHIDA and JAMES E. NISHIDA, d/b/a Hilo Dairy Company of Kauai, RYOJU SOKEI, d/b/a Sokei Dairy, and FRED L. WALDRON, LIMITED, *Petitioners*,

vs.

E. I. DU PONT DE NEMOURS & COMPANY, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The order (R. 106, App. to Petition 13-A) and opinion (R. 502) of the District Court for the Northern District of Mississippi denying Petitioners' Motion for a New Trial has not been reported. The opinion of the Court of Appeals for the Fifth Circuit (App. to Petition 1-A to 12-A) is reported in 245 F.2d 768.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

While we do not believe that any questions, in a true legal sense, are presented in the state of the record herein, the Petitioners have predicated certain points upon which the Petition is based, and the Respondent must necessarily adapt itself to answer them. Stated briefly, as they appear to Respondent's analysis, these points are:

1. Whether the Court below erroneously applied State law rather than Federal decisions to the interpretation of a Federal statute.

2. Whether the trial Court deprived the Petitioners herein of any legal rights, when it directed liability without regard to the type of violation, whether statutory or common law, and limited the jury's consideration to whether or not that liability had been intercepted by an intervening act, breaking the chain of causation.

3. Whether the trial Court deprived the Petitioners herein of any legal rights when it directed liability without regard to the type of violation, whether statutory or common law, instead of instructing the jury as to the meaning of negligence *per se* and allowing it to consider the existence of actionable negligence under all the circumstances.

4. Whether, under the record in this case, Rule 46, *F.R.C.P.*, excuses the failure to take exceptions to the trial Court's charge under Rule 51, *F.R.C.P.*

5. Whether violations of the Federal Food, Drug and Cosmetic Act are actionable as a new and independent Federal civil cause of action, determinable only by Federal Courts to the exclusion of State law and State Court decisions.

STATUTES AND RULES INVOLVED.

The Respondent does not believe that any statutes are properly involved, under the state of the record herein. As Petitioners present it, however, there is involved:

Federal Food, Drug and Cosmetic Act [June 25, 1938], Chapter 675, Section 1, 52 Stat. 1040, 21 U.S.C., Ch. 9.

Rules 46 and 51, *F.R.C.P.*

Rule 19, Revised Rules of United States Supreme Court.

STATEMENT OF CASE.

The Petitioners devote thirty-six pages to their presentation of the facts with which, except for the addenda hereto and the observation that their presentation is understandably, and within the limits of advocacy, slanted to expound Petitioners' views, the Respondents do not materially disagree. We do point out, however, that in this Petition for a legal review, thirty-one of the thirty-six pages (pp. 5-35, incl.) are directed solely to a factual review of an issue which has been resolved by the jury on the question of proximate causation, and the remaining five pages of their "Statement of Case" (pp. 36-41, incl.) are predicated on Counsel's statement that is admittedly outside the record (Petition, p. 36). Accordingly, while we do not believe a factual review is proper, we submit that, since the Peti-

tioners have proffered these facts to the Court, they should be supplemented by the following addenda.

Respondent has emphatically denied that any sales of tri were made for the purpose of processing soybeans to make cattle feed after the delivery of the warning letter of July 31, 1951, and has denied that it introduced into interstate commerce any tri for that purpose which was used or involved in the meal purchased by the Petitioners herein. R. S. Armstrong testified that the Magnolia plant did not expect to resume operations after his visit to the plant to deliver the letter on August 3, 1951, and that they (Magnolia) were going to look into the possibility of channeling their meal to swine and poultry (R. 427, 434).

Frank L. McDonald, plant manager of the Magnolia plant, which sold the meal that ultimately reached the Petitioners, testified that he left Magnolia's employ on September 24, 1951 (R. 365), and that before he left, he advised the plant management (and sole owners), Messrs. Ford, Reed and Warren, that they should not sell for cattle feed and that Messrs. Ford and Reed assured Mr. Warren that it would be all right (R. 375).

C. B. Shepherd, manager of the Chlorine Products Division of the Respondent, testified that the first rumors of any trouble from the feeding of tri-processed soybean meal to cattle came in the early part of 1950 from Colorado; that investigation of 150 cattle deaths indicated that only 20 had received the tri-processed soybean meal, and that the possibility of tri being a factor was completely rejected by the state veterinarian (R. 450-451). By this time some 60 million pounds of tri-processed meal had been sold throughout the country with no bad results and no complaints—since the opening of several plants right after the War (1944), and increased activity in this field beginning in 1947 (R. 449, 450).

It was also testified that the Respondent called the attention of Lyman Reed, Secretary and Sales Manager of the processing plant Magnolia, to the resolution of the American Feed Control Association, carried in the magazine "Feedstuffs" (D. 9, R. 537), that a label be placed on bags of tri-processed soybean meal to the effect that the meal should not be fed to cattle. Mr. Reed was aware of this resolution and the admonition to so label, and this conversation was before the first shipment of meal that ultimately reached the Petitioners (R. 439, 129).

ARGUMENT.

I.

The Record in This Case Presents Neither the Interpretation of a Federal Statute nor the Application of State Law Thereto.

We respectfully submit that the Petitioners herein err twofold in their presentation of this first point. In the first place, the Federal Food, Drug and Cosmetic Act is not involved, since the trial Court directed the jury to find the Respondent liable unless the chain of causation had been broken by an intervening act of negligence.

In the second place, the Court below expressly stated that it was moot to discuss the applicability of the *Ladner* case [*du Pont de Nemours & Co., E. I.*, v. *Ladner*, 221 Miss. 378, 73 So.2d 240], since it felt there was ample evidence to justify the jury's conclusion that the chain of causation had been broken and the Respondent absolved of responsibility by the intervening act of the ~~possessing~~ processing plant, Magnolia.

The only reference by the Court below to the *Ladner* case was to borrow general principles of law as to what

constituted a breaking of the chain of causation. It is so clear that the Court did not rely upon it as authoritative that we believe further discussion unnecessary. The language of the opinion is entirely expressive (App. to Petition 11-A):

> "There was ample evidence to sustain the verdict for du Pont on the issue of intervening cause. We need not determine whether, had the verdict and judgment been for the appellants, we would be required to reverse under the rationale of the *Ladner* case."*

Quite apart from the negation of the Petitioners' presentation of this point, and while the Court below did not feel bound by nor rely upon the *Ladner* case, the Respondent affirmatively submits as an additional reason for the denial of this Petition that the Court below should have been bound by it under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), and may have so found had their decision not been based on other grounds.

It is curious and is noted in connection with this affirmative presentation that the Petitioners insist that the Court below felt bound by the *Ladner* decision (Pet. pp. 43, 44). If this were so—Respondents would have been entitled to a directed verdict on its motion and this argument would be unnecessary.

We submit that the only question involved as this case was presented to the jury by the trial Court, with its direction as to liability, was that of proximate cause and intervening act and that this is a composite of law and fact. There must be first an acceptance of the legal theory that a legally sufficient intervening act absolves an original tortfeasor, and second, an interpretation as to what constitutes

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*Italics ours.

a legally sufficient intervening act. The first is a pure legal theory; the second is a determination as to the quantum of fact required to set the first in motion.

We are satisfied that Petitioners will concede that Hawaii accepts the doctrine of proximate cause and intervening act. In fact, Petitioners, on pp. 56, 57 of the Petition, cite and quote the case of *Ward* v. *Inter-Island Navigation Co.*, 22 Haw. 66, 488, recognizing these principles. This case also holds:

> "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. *In such a case the resort of the sufferer must be to the originator of the intermediate cause* * * *. *The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating which produced the injury.*
>
> "The crucial question, the pivotal fact, in the case at bar is, therefore, whether the primary fault, the negligence of the defendant, and the injury of the plaintiff are naturally and probably connected with each other by a continuous sequence, or dissevered by a new and independent agency." [Emphasis ours.]

The inescapable conclusion—one that could have been anticipated in the common law jurisdiction of Hawaii—that Hawaii accepts the doctrine establishes that its law is the same as that of Mississippi. Assuming Petitioners can evade the *presumption* of similarity, we necessarily arrive at the *actuality* of similarity as established by the law itself. In either event, the result as to the legal theory is the same —*i.e.*, that under either approach it must be conceded that

the legal doctrine of the intervening act is applicable to the instant case.

This leaves only the factual aspect of the doctrine to be considered—*i. e.*, what quantum of fact is necessary to constitute a legally sufficient intervening act—and we respectfully submit that as to this there was nothing left to decide. The *Ladner* case eloquently holds—in the pronouncement of the Supreme Court of Mississippi—that the identical quantum of facts herein considered, *as a matter of law* and contrary to the jury's finding, constitute a legally sufficient intervening act.

Once having established that Hawaii accepts the principle, can it be reasonably argued that Hawaii would find differently as to the quantum of fact? Is there any question but that this facet of the doctrine—*i.e.*, the fact side—must be considered *stare decisis*? We respectfully submit that, with the Supreme Court of Mississippi having concluded by unanimous opinion that a certain set of facts constitute—as a matter of law—a legally sufficient intervening act, and with it clear that the doctrines of proximate cause and intervening act are applicable, the United States Court sitting in the same state should have accepted that finding as conclusive, under the *Erie* v. *Tompkins* case.

Putting it another way, and in some repetition, the Supreme Court of Mississippi has decided unanimously that the undisputed fact of the warning given to Magnolia by means of du Pont's letter of July 31, 1951, and Magnolia's sales of meal several months thereafter, is sufficient proof of an intervening and independent act, so as to break any possible chain of causal relationship between du Pont and the alleged damages of the Petitioners and thus to relieve du Pont from any legal liability to ultimate consumers of

the meal, whether they be Frank Ladner or the Petitioners herein.

Perhaps the most cogent expression of these conflicts principles appeared in the Mississippi case of *United States Fidelity and Guaranty Co.* v. *Yost*, 183 Miss. 65, 183 So. 260 (1938), suggestion of error overruled at 185 So. 564, where the Mississippi Supreme Court, in applying the substantive law of Tennessee, expressly held that the "quantum of proof required," i.e., the factual evidence necessary to warrant the application of a principle of substantive law, is governed by the law of the forum, Mississippi.

It is clear that even though the substantive rights of the parties are controlled by the law of the place of the injury, adjective rights, pertaining to remedy and including rules of evidence and proof, are controlled by the law of the forum. *Booth* v. *Teche Lines*, 165 Miss. 343, 143 So. 418 (1932); *Interstate Life and Accident Co.* v. *Pannell*, 169 Miss. 50, 152 So. 635 (1934).

We believe it to be entirely clear that, under the general common law and under the laws of Hawaii, the rule of negligence law to the effect that an original *tort-feasor* may be immunized from legal liability for his acts where there have been intervening and separate acts of negligence by others is well recognized. But the *quantum of proof or fact* which is deemed sufficient to warrant bringing into operation the "intervening act" principle of negligence law is to be determined not by the law of the "foreign" state but by the law of the forum. *Booth* v. *Teche Lines*, *supra*, and *U. S. Fidelity & Guaranty Co.* v. *Yost*, *supra*.

When there is a conflict of laws presented in a case, then the question is presented as to the substantive law of which state concerned should be applied. This Honorable Court, in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313

U.S. 487 (1941), faced the question as to whether the Federal Courts must follow conflict of laws rules prevailing in the states in which they sit. The question presented there was whether a New Jersey concern was liable for damages for interest on a judgment under a New York statute requiring said interest when the subject damages accrued. The suit was filed in the Federal Court in Delaware. The Supreme Court stated that the conflict of laws rule of Delaware should be applied since the suit was filed in the Delaware Federal Court, the Court stating:

> "We are of opinion that the prohibition declared in Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, 114 A.L.R. 1487, against such independent determinations by the federal courts extends to the field of conflict of laws. *The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side.*"*

This Court mentioned, in the last cited case, the case of *Sampson* v. *Channell*, 110 F.2d 754 (C.A. 1st, 1940), cert. denied 310 U.S. 650, wherein a car driven by defendant's testator collided with a car driven by plaintiff, injuring the plaintiff and his wife. The wife recovered judgment in the United States District Court of Massachusetts, and the husband sought a similar judgment and sought to have the Federal Court enforce the Massachusetts rule that contributory negligence places the burden of proving the lack of care on the part of the plaintiff on the defendant. The lower court declined to do so, following the Maine law; on appeal to the Court of Appeals for the First Circuit, said Court was of the opinion that the District Court should

*Emphasis ours

have followed the Massachusetts rule for the reason that Federal Courts must follow state conflict of laws rules because they are parts of the substantive law, and further, that the conflict of laws rule of a state must be followed even though the state court has said that a part of the rule is substantive and another part is procedural. The Court of Appeals stated:

> "* * * If the Federal court in Massachusetts on points of conflict of laws may disregard the law of Massachusetts as formulated by the Supreme Judicial Court and take its own view as a matter of 'general law', then the ghost of Swift v. Tyson, supra, still walks abroad, somewhat shrunken in size, yet capable of much mischief. In the case at bar, it is difficult to see that any gain in the direction of uniformity would be achieved by creating a discrepancy between the rules of law applicable in the Massachusetts state and Federal courts, respectively, in order to bring the law of the Massachusetts Federal court in harmony with the law that would be applied in the state courts of Maine.
>
> "Our conclusion is that the court below was bound to apply the law as to burden of proof as it would have been applied by the state courts in Massachusetts."

Summarizing, we believe the factors that have been established are:

1. That Hawaii accepts the doctrine of the "intervening act."

2. That the legal substantive principle, under proper proof, is controlled by the law of the place where the injury occurred (Hawaii).

3. That the quantum of fact necessary to constitute a legally sufficient intervening act is controlled by the law of the state in which the action is tried (Mississippi).

4. That whether the alleged violation is common law or statutory, a legally sufficient intervening act immunizes the original tort-feasor.

5. That the Mississippi Supreme Court has ruled, as a matter of law, that the identical controlling facts herein under consideration constitute a legally sufficient intervening act.

II.

The Petitioners Were Accorded the Ultimate When the Trial Court Directed the Jury to Find Liability Unless Causal Relation Was Negated by an Intervening Act; That Issue of Liability Was Thus Removed from the Case and the Basis of Liability Therefore Needed No Clarification by Instruction.

We respectfully submit that, under the above heading, inasmuch as questions 2 and 3 of the Petition are so akin to each other, they are both resolved by the argument herein.

We do not believe it an over-simplification to say that —in the trial of this cause—Petitioners had two, and only two, problems (exclusive of the amount of damages) to face. These were: (1) The establishment of negligence of the Respondent, and (2) The establishment that the predicate for such negligence was the proximate cause of their damage.

The trial Court—as a matter of law—resolved the first problem in the Petitioners' favor by directing the jury to find liability unless the second was answered in the negative. In adopting Petitioners' requested Instruction No. 10, it directed the jury as follows:

"If you should believe from a preponderance of the evidence in this case, that the defendants sold tri

solvent to the Magnolia Soy Products Company knowing that it was to be used by that company in the manufacture of soybean oil for sale in Interstate Commerce as cattle feed, and that the action of the defendants prior to the sale of the soybean meal which was ultimately purchased by plaintiffs and used in feeding their cattle, or prior to the time when they received the same in the Territory of Hawaii, were not such as would have caused a reasonably prudent man to desist in selling such meal for cattle feed, or was such that a reasonably prudent man in the position of the defendant knew, or should have known that the said company, that is, referring to Magnolia Soy Products Company, would continue to sell said meal in Interstate Commerce for cattle feed and would not have regarded the sale of this meal, tri meal, for cattle feed by said company, again referring to the Magnolia Soybean Products Company, as extraordinary under the circumstances, then your verdict would be for the plaintiff." (R. 485).

It should also be noted that the actions of Respondent du Pont which the Court directed the jury to consider were not confined simply to the letter delivered August 3, 1951, or those immediately surrounding the same, because the above language includes the words "that the action of the Respondent *prior* to the sale of the soybean meal which was ultimately purchased by plaintiffs and used in feeding their cattle, or *prior* to the time when they received the same in the Territory of Hawaii, were not such as would have caused a reasonably prudent man to desist in selling such meal for cattle feed", etc. Therefore, from the time alluded to by the trial Court, we have all time antedating the delivery and use of the meal in Hawaii. Certainly this broad expanse of time is ample to cover every act done or omitted to be done by du Pont on the question of causation or of intervening cause.

The Court of Appeals was correct in holding that the Federal Act was completely immaterial. It pointed out, in effect, that the lower court had given a peremptory instruction for the plaintiffs (Petitioners here), save and except only for the determination by the jury as to the "break of the chain of causation" or the decision as to the issue of intervening cause. A recitation of the provisions of the Federal Act would have been entirely useless and meaningless to the jury, whether the Court concluded thereafter by stating that any violations constituted "negligence *per se*", or even had the trial Court said that there was a case of absolute liability against du Pont unless the jury believed that the chain of causation was broken or that the intervening cause was efficacious under the law.

It is axiomatic that negligence is never actionable unless the same proximately cause or contribute to the injury or damage of a claimant. It remains simply an abstract term and nothing more. There must be the finding by the jury or the court of the existence of the nexus of "proximate causation" between a claimant's damage and the negligence, act or omission of another, whether the latter be designated as "negligence *per se*", "*prima facie* negligence", "absolute liability", or the like. This is not a *general* principle of law, but a *universal* principle of law. This is so, whether the negligence is one under the common law or declared by statute or ordinance.

65 *C.J.S.*, Negligence, Section 105, p. 654, states in part:

> "The rule that no liability attaches unless it appears that there was a causal connection between the negligent act or omission charged and the injury, discussed supra, Section 104, is applicable where the act or omission complained of constituted a violation of some statute or ordinance, even though such violation constitutes negligence per se or is prima facie evidence of negligence."

The requirement of the existence of "proximate cause" in affixing liability for a tortious injury is "one of universal application", as held in 86 *C.J.S.*, Torts, Section 27, p. 941, which states in part:

> "In determining liability for a tortious injury, the law looks only to the act or omission from which the result follows in direct sequence without the intervention of a voluntary independent cause and declines to permit further investigation into the chain of events, and, unless the act complained of is the proximate cause of the injury, there is no legal liability. The rule is one of universal application * * *."

We analogize the provisions of the Federal Food, Drug and Cosmetic Act with the Federal Safety Appliance Act, the latter of which declares it to be unlawful for any common carrier engaged in interstate commerce by railroad to haul or to permit to be hauled or used on its lines certain equipment on cars moving in interstate traffic, and as to which the United States Supreme Court has held that the Federal Safety Appliance Act imposes an absolute duty on the railroad. The Supreme Court, as to said Appliance Act, in *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U.S. 430 (1949), at 434, said the violation of said Act is sometimes described as "negligence *per se*", but that:

> "* * * we have made clear in the O'Donnell case that that term is a confusing label for what is simply a violation of an absolute duty."

In that same case, the Court, however, held that still proximate causation must be shown in order to affix liability, and that a simple showing of a violation of the Act does not automatically entitle a person to damages, as observed from the following excerpt:

> "Once the violation is established, only *causal* relation is in issue." (Emphasis ours).

As to said Federal Safety Appliance Act, *Davis, etc.*, v. *Wolfe*, 263 U.S. 239, 243 (1923), clearly holds that unless the evidence show proximate causation, no verdict can stand, and that if the evidence merely show a failure to comply with the Act and that said failure merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury, the suit is not maintainable, all as shown by the following excerpt:

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; * * *."

We submit that the Respondent, and not the Petitioners, can rightfully complain of the trial Court's action in issuing a peremptory instruction on liability and leaving only proximate cause to be considered by the jury. Since that error has been made harmless by the jury verdict, it need not be discussed at length here. Suffice it to say, that even on liability the proof was entirely lacking to make it other than a jury question, in that:

1. There was no proof that any tri remained in the meal.

2. There was no proof that the *use* of a processing agent (tri) which is entirely consumed in the manufacture of the meal *comes* within the terms of the Federal Food, Drug and Cosmetic Act.

3. There was no proof that the sales involved herein were made of meal manufactured by the use of Respondent's tri sold for that purpose; in fact, the proof is to the direct contrary (R. 427, 434).

4. It was a jury question as to whether the Respondent induced the vendor of the meal (Magnolia) to enter into the use of tri for processing soy bean meal for cattle feed, except on his own judgment and after all the facts had been revealed (Ex. D-4, R. 510).

5. There was no proof in the record that tri was a poison; in fact, Petitioners' expert, Dr. Raymond T. Vaughn, testified to the contrary (R. 340, 341, 348, 349).

6. There was no proof in the record that tri-processed meal, under all circumstances and *per se*, was toxic, in view of the testimony that some 60 million pounds had been sold without incident (R. 449, 450), and the testimony of Dr. Vaughn that many variables were involved, such as heat, the age of the bean, etc. (R. 347, 352) which are related to the toxicity or lack of it in the ultimate meal.

III.

Petitioners Were Well Aware That the Court Had Declined Their Requested Instructions (Except Instruction No. 10) in Haec Verba and Took No Exception, Except to the Failure to Instruct on Prospective Profits (Instruction No. 18); Having Taken No Exception, They Are Now Precluded from Raising This Refusal under Rule 51, F.R.C.P.

While we vehemently disagree with the recitation in the Petition as to the circumstances of the conference in chambers prior to the charge to the jury (Petition p. 36), which is admittedly outside the record, we will not add to the impropriety by submitting our version.

There can be no question, however, but that the Petitioners heard the entire charge, knew its contents, heard the Court ask: "Are there any exceptions or objections, gentlemen, to the charge as given, or any requests for ad-

ditional instructions?" (R. 490), to which Mr. Brooks, of Petitioners' Counsel, replied: "May we have two or three minutes, Your Honor, for a brief consultation.", and later, after further discussion in chambers, upon Mr. Thomas's statement, "I believe the Court asked if there were any objections or exceptions", Mr. Brooks said, "That is correct; you go ahead." (R. 492).

Following this (R. 494), Mr. Tavares raised the only exception taken by the Petitioners, as follows: "For the record, Your Honor, may we most respectfully raise the question of law by excepting to the Court's ruling, ruling out possible prospective profits."

As the concluding admonition to the jury—after the arguments of Counsel—the Court reiterated its charge as previously given, with several minor corrections, not pertinent here (R. 497-499).

The applicable law is clear and has been repeatedly pronounced. In *Palmer et al., Trustees for the New York, New Haven & Hartford Railroad Co.* v. *Hoffman, Individually and As Administrator*, 318 U.S. 109, at 119 (1943), the Supreme Court said:

> "* * * As we have noted, petitioners in their exceptions to the charge given and in the requested charge did not differentiate between the causes of action based on the Massachusetts statute and those on the common law. * * * Under these facts a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial." (Citing additional cases).

Following the above rule, the Court below in this case cites and quotes one of its own opinions, viz. *Good Holding Co.* v. *Boswell,* (5th Cir., 1949) 173 F.2d 395, 401, wherein it held:

> "We further find that the oral charge of the Court, when fairly considered in its entirety, substantially preserved all material issues in the case for the consideration of the jury. In any event, although adequate opportunity was had to challenge the oral charge, no exceptions were taken, and the Court may not now be put in error in this regard."

In conclusion on this point, we respectfully submit that both from the record and the state of the law, Petitioners were entirely satisfied with the charge, except as to the question of prospective profits (and this goes only to the amount of damages), and their present position is born of surprise and dissatisfaction with the jury verdict, whereby they now attempt to raise questions that were not properly preserved at the time of the trial.

IV.

Assuming Arguendo That the Federal Food, Drug and Cosmetic Act Created at Its Passage a New and Independent Federal Civil Cause of Action, We Submit That This Is in No Way Pertinent to the Issues in This Case.

As previously urged under point I, we contend that this matter does not embrace the interpretation of any Federal Statute, and specifically the Federal Food, Drug and Cosmetic Act, but presents solely a question of proximate causation and intervening act. However, we now proceed to meet the presentation of the Petitioners herein—despite the impression of non-relevancy.

It is respectfully contended that, even conceding the major premise of the Petitioners that a new cause of action is created by the Act, nothing is added by this theory nor is anything taken away from the state of the law as it has existed since the passage of the Act and throughout the legion of decisions of both Federal and State Courts interpreting it.

Petitioners concede that there is no authority for this proposition and in the absence of authority we are unable to entirely comprehend the rationale of this point. If it is meant that the determination of questions under the Act should be relegated to Federal Courts alone we submit that the introduction of it into this case—where the matter arose in the Federal District Court for Northern Mississippi, was appealed to and decided by the Court of Appeals for the Fifth Circuit—is completely beyond comprehension in view of the strictly Federal jurisdictional periphery surrounding this case.

If it is meant to imply that the District Court or the Court of Appeals applied the reasoning of the State Supreme Court in the *Ladner* case, that is belied in the opinion of the Court of Appeals as argued hereunder in point I, and was never a part of the District Court's action.

If it is meant to imply that henceforth this Honorable Court should restrict the interpretation of the Federal Food, Drug and Cosmetic Act to Federal Courts and in some way create a set of rules for universal guidance, we submit that this is neither an issue in the instant case nor is it conceivable for future cases that—without legislative fiat—State Courts should be deprived of the right to decide such questions involving Federal statutes such as the Federal Food, Drug and Cosmetic Act, the Employers Liability Act, the Fair Labor Standards Act, and others.

If it is meant that, for the first time since the passage of the Act in 1938, a new and independent civil cause of action—in some inexplicable way cognizable only in the Federal Courts—is created after twenty years of decisional and administrative law, in cases before the Food and Drug Administration, the various State Courts, both lower and appellate, and the Federal Courts, we find neither a basis for such naissance nor an excuse for its delay.

CONCLUSION.

In summary, we submit that Petitioners have entirely failed to present reasons or grounds within the provisions of Rule 19, Supreme Court Rules, to warrant a review on certiorari.

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Earl T. Thomas,

Carl E. Geuther, By J.

Carl E. Geuther,
Counsel for Respondent.

CERTIFICATE OF SERVICE.

I, Earl T. Thomas, one of the Attorneys of, and of Counsel for, the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this, the below-noted date, I served true copies of the above and foregoing Brief for Respondent in Opposition on Petitioners, by mailing on this date such

true copies respectively, in duly and properly addressed envelopes, with first class, air mail postage prepaid, to Petitioners' respective Attorneys, as follows:

To: Roger E. Brooks, Esq.
923 20th Street, N. W.
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To: Pratt, Tavares & Cassidy, Esqs.
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To: William G. Burgin, Jr., Esq.
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This December 11, 1957.

EARL T. THOMAS,
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